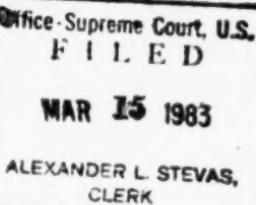


82 - 1533



No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LANDON L. WILLIAMS, WILLIAM BOYLE
AND GEORGE BARONE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

RICHARD BEN-VENISTE, ESQUIRE

BEN-VENISTE & SHERNOFF
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016
(202) 966-6000

IRVING ANOLIK, ESQUIRE

20 Vesey Street
New York, New York 10007
(212) 732-3050

Counsel for Petitioners

(i)

QUESTION PRESENTED FOR REVIEW

Whether a trial court is free to disregard Fed. R. Crim. P. 24(c) and substitute an unsequestered alternate juror, previously discharged by the court, for an incapacitated member of the jury after seven days of jury deliberations and over defendants' objection.

PARTIES

The parties to the proceeding before the Court of Appeals for the Eleventh Circuit whose judgment petitioners Landon L. Williams, William Boyle and George Barone seek to reverse were defendants-appellants Dorothy O. Kopituk, Raymond C. Kopituk, Oscar Morales, Fred R. Field, Jr., Cleveland Turner, James Vanderwyde, Landon L. Williams, William Boyle and George Barone and plaintiff-appellee the United States of America.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, reported as *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), appears in Appendix A ("App. A") hereto. The order of the Court of Appeals denying petitioners' petition for rehearing, not officially reported, appears as Appendix B ("App. B") hereto. The opinion of the United States District Court for the Southern District of Florida (Hoeveler, J.), reported as *United*

States v. Barone, 83 F.R.D. 565 (S.D. Fla. 1979), appears in Appendix C ("App. C") hereto.

JURISDICTION

The judgment of the Court of Appeals was dated and entered November 4, 1982. (App. A at 2a; 690 F.2d at 1289.) A timely petition for rehearing was denied on January 14, 1983. (App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rules 17.1(a) and (c) of the Rules of this Court.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 23(b) of the Federal Rules of Criminal Procedure provides:

Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Rule 24(c) of the Federal Rules of Criminal Procedure provides, in relevant part:

The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

STATEMENT OF FACTS

On June 7, 1978 petitioners George Barone, William Boyle and Landon L. Williams, union officers, along with nineteen other defendants,¹ were named in a 70-count indictment returned by a federal grand jury sitting in the Southern District of Florida. (App. A at 3a; 690 F.2d at 1294-95.) Of the eleven defendants who went to trial, nine were convicted. (App. A at 3a n.2; 690 F.2d at 1294-95 n.2.) The alleged offenses—basically involving the solicitation and receipt of funds from a number of individuals and businesses who employed union members and the failure to include this income on federal income tax returns—spanned a period of more than ten years. (App. A at 2a; 690 F.2d at 1294.)

Trial commenced on January 29, 1979. (App. C at 120a; 83 F.R.D. at 566.) The jury was instructed as to the law on Friday, August 11, 1979, and immediately retired to deliberate. The court then intentionally contravened the requirements of Fed. R. Crim. P. 24(c) by refusing to discharge the alternates. (App. D at 139a-141a.) Instead, and over defendants' objections (App. D at 142a²), the court ordered the two alternates sequestered separate and apart from the deliberating jurors.³ (App. D at 142a-145a.) On August 15, 1979 the court

¹ Included as defendants were several employers who were charged with making illegal payoffs. Motions by union officers and employers for severance were denied. (App. A at 50a; 690 F.2d at 1315.)

² References to "App. D ____" are to the Trial Transcript in the proceedings below.

³ Importantly, while the court directed the two alternates not to discuss the case with "anybody, not the Press, not . . . the lawyers, not . . . anyone else . . .," the court did not instruct them not to discuss the case *inter se*. (App. D at 141a.)

brought the two alternates into the courtroom, thanked them for their service and advised them that while there had almost been occasion for their use, the "problems"⁴ had passed. (App. D at 165a-167a.) Further, the court stated that although the court was discharging them,⁵ they should "avoid the Press and television coverage in the slim possibility that we might still call you." (App. D at 166a.)

On Monday, August 20, 1979, the court received a note from the jury advising that one of the jurors, Mrs. Loescher, appeared to be in need of "professional help."⁶ (App. D at 171a.) The court inquired as to whether the parties would stipulate to an eleven member jury. (App. D at 228a-229a.) All defendants declined. (*Id.*) The jury was instructed to suspend its deliberations. (App. D at 238a.)

⁴ One of the jurors had related to the others information obtained from an improper source, and, contrary to the court's admonitions, did not report the incident to the court. (App. D at 151a.) The circumstances surrounding this incident provide insight into later developments. See note 9 *infra*.

⁵ This was consistent with the court's earlier expressed intention to keep the alternates sequestered for some limited period after deliberations had begun. (App. D at 139a-140a, 143a-144a.)

⁶ As then described by the deputy marshal responsible for guarding the jury room:

[Mrs. Loescher] seems to think that someone is telling her things to do and most of them have nothing to do with the case whatsoever....

She thinks the Lord is talking to her. She also thinks Lucifer is after her. That at one time she made the statement that she was Jesus. Another time she made the statement she was Moses. . . .

(App. D at 173a.) This marshal had previously advised the court on the preceding Friday, August 17, that "Mrs. Loescher was acting strangely." (App. D at 169a.)

By this point in its deliberations, the originally constituted jury had initiated approximately 17 oral and written communications with the court, including (a) seven requests (some with subparts) for substantive information or instructions concerning the law and/or evidence;⁷ (b) nine requests (some with subparts) for procedural guidance concerning the conduct of the jury's deliberations;⁸ and (c) a note concerning one juror's disclosure of information obtained from an improper source.⁹

⁷ For example, the jury requested additional instructions with respect to extortion, racketeering, and hearsay (T 101:26-30) and repetition of trial testimony concerning certain witnesses (T 101:88-90) and the dates of certain events (T 101:89-90; T 103:2). (References to excerpts from the trial transcript which do not appear in App. D hereto will be cited as "(T ____:____)", the first number representing the volume of the transcript and the second number(s) representing the particular page(s) cited.) (See also T 100:48, T 101:27-29.)

⁸ Included among these communications were requests for an adding machine and a 12-column accounting pad, obviously requested by the jury for review and analysis of the extensive financial evidence presented during the course of the trial. (T 102:4.) (See also T 100:2, T 100:3, T 101:3, T 101:31, T 101:69, T 103:2.)

⁹ A more detailed examination of the available facts concerning this incident, which obviously had a polarizing effect on the jury, is enlightening. On the fourth day of deliberations, one of the jurors, Mrs. Arrington, advised the other jurors that one of the defendants, Reverend Elijah Jackson, "was acquitted due to not enough evidence." (App. D at 150a.) In fact, defendant Jackson's motion for a directed verdict of acquittal had been granted by the court. (App. A at 3a n.2; 690 F.2d at 1294 n.2.) Contrary to the court's instruction that the presence or absence of any of the defendants was not a matter for their concern (App. D at 160a & T 99:64, T 99:86), Juror Arrington had not reported her receipt of this information from an outside source to the court. (App. D

In response to the jury's requests, the court reread almost all its instructions on the law and provided the jury with five or six copies of the typewritten instructions. (T 101:41-79, T 102:26-28.) The jury had also been furnished with the trial exhibits. (T 99:152-153.) The two alternates were, of course, excluded from all review and discussions surrounding the foregoing communications.

A court-appointed psychiatrist examined Mrs. Loescher on the evening of August 20, and reported to the court and counsel on the following morning that Mrs. Loescher, a psychiatric nurse with no prior history of emotional disorders, appeared to be "going through a

at 150a-151a.) When questioned by the court in the presence of the other jurors and counsel, Juror Arrington stated, "Well, it just slipped out, Your Honor. . . . I didn't intend to say it." (App. D at 160a.) Despite the court's initial observation that "[w]e ought to seriously consider whether or not she should remain as a juror" (App. D at 151a), the court denied motions to dismiss Juror Arrington and declare a mistrial. (App. D at 151a-154a.) When the jury first entered the courtroom to report the incident it was apparent that Mrs. Loescher was very upset. One of the attorneys noted that Mrs. Loescher was crying and was close to collapse. (App. D at 147a-148a.) The court observed that other members of the jury were also upset. (App. D at 151a.) It was clear that Mrs. Loescher was critical of Mrs. Arrington's failure to heed the instructions of the court. (App. D at 160a.) Nevertheless, the court responded to Mrs. Arrington's explanation by telling her and the other jurors:

I understand. I am not here to criticize anybody. . . . I want to tell you all to relax and settle down and not be upset with each other, because that is not what we are here about. Those problems happen, and it is our function to try to solve them as best we can.

(App. D at 160a; emphasis added.) It may well have appeared to Mrs. Loescher that, notwithstanding the court's prior directives, the judge was excusing Mrs. Arrington's misconduct. It may have thus seemed to Mrs. Loescher that she could not turn to the court for help or guidance relating to an impasse in deliberations.

manic episode" and was "by every definition psychotic." (App. D at 244a.)¹⁰ The psychiatrist further advised that Mrs. Loescher was not capable of functioning as a juror. (App. D at 246a.)¹¹ In his confidential report to the court, the psychiatrist revealed that Mrs. Loescher had been the lone dissenter on a vote taken by the jury. (App. D at 244a.) The court, without objection, discharged Juror Loescher. (App. D at 261a.)

After again inquiring as to whether the defendants would stipulate to a jury of eleven, and again receiving a unanimous declination (App. D at 261a-262a), the court announced that it was considering recalling and impaneling the first alternate juror, who by this time had been free from sequestration for seven days.¹² (App. D at 262a.) After extensive argument over the legality of reactivating the previously discharged alternate, the court

¹⁰ The psychiatrist found, *inter alia*, that Mrs. Loescher was "unquestionably grandiose," believing that she was of genius intellectual ability, and that she suffered from "religious delusions," including that "God had given her the wisdom of Solomon," that she "was like Christ at Gethsemane" and that she was "on the jury . . . as a way of making th[e] case come out the way God wants." (App. D at 243a-244a.)

¹¹ The psychiatrist noted that, in addition to her inability to function with good judgment,

[Mrs. Loescher] would be extremely difficult for the other jurors to communicate with and I'm sure that she would serve as a disruptive force on the jury.

(App. D at 245a.)

¹² The court stated, however:

I will be frank with you that the research suggests that it [i.e., recalling the alternate] is probably not the thing to do. (App. D at 262a.)

overruled the defendants' strenuous objections. (T 106:2-44.) Petitioners' timely motions for mistrial were denied. (T 106:52-54.)

The alternate juror, Mrs. Evangelist, was then summoned to court and interrogated by the trial judge in the presence of counsel. (App. D at 264a-267a.) The court accepted at face value the alternate's assurance that she had not come in contact with any print or electronic media coverage of this highly publicized case during the week following her discharge (App. D at 264a-265a),¹³ as well as her claim that she did not discuss with anyone the trial which had just occupied the past six months of her time. (App. D at 264a-267a.)¹⁴

The court then individually interrogated the remaining eleven jurors on the extraordinary question of whether they felt they could totally disregard and put out of their minds all prior deliberations, and begin their deliberations anew together with Mrs. Evangelist. (App. D at 278a-327a.) In each instance, however, before inquiring as to the juror's ability to start afresh, the court told the juror that the questioning was being conducted with a view toward going forward with the case and that the case could only proceed if the jurors could start anew. (App. D at 278a, 284a, 287a-288a, 294a, 298a, 300a,

¹³ The court had previously suggested a need for sequestration of the alternates at the time the jury initially retired, stating: "There obviously is going to be publicity about the case now. . . ." (App. D at 143a.)

¹⁴ However, the court did not inquire as to whether Ms. Evangelist had discussed the case with her fellow alternate, with whom she had been jointly sequestered for the first five days of the jury's deliberations. (App. D at 139a-144a.) To assume they did not discuss the case flies in the face of common sense.

302a, 305a, 307a, 310a-311a, 314a, 318a, 321a, & 324a.)

In the course of the court's questioning, six of the eleven jurors expressed initial reluctance and/or doubts as to their ability to commence new deliberations.¹⁵ In

¹⁵ For example, in response to the Court's questioning, Juror Rollins stated:

I want to hurry and get this over with. . . .

* * *

[*The Court*]: We are going to substitute an alternate juror. In order to do that, you must all begin at square one.

Juror Rollins: All over again?

The Court: All over again.

* * *

Juror Rollins: Do you mean all that voting and stuff—

The Court: I mean this, Mrs. Rollins, so that you understand exactly what I am saying:

Just like when I finished instructing you and you walked back there for the first time. You have got to start over again.

Juror Rollins: Oh, no. Do you mean go over and through everything?

* * *

Juror Rollins: Well, if I have to, I will do it, but I sure—

The Court: Do you think you can do it?

Juror Rollins: You know, I have took the oath. If I have to, I will. I really—I don't want to do that.

(App. D at 294a-295a.) Juror Spires replied to the Court's questioning as follows:

Do I have a choice, Judge? . . . I have no physical or mental reasons why I can't, but I just want to be with my family again.

(App. D at 324a.) Several other jurors expressed concerns as to the personal burdens which new deliberations would impose. See, e.g., App. D at 280a (Juror Rappel stated new deliberations "would create a little hardship . . . [a]s far as my personal health

[footnote continued]

several instances, the judge interrupted or attempted to minimize such jurors' expressions of concerns. (*See, e.g.*, App. D at 280a, 289a, 295a, & 302a-303a.) Ultimately, under the court's suggestive questioning, all eleven remaining jurors confirmed that they would be able to erase from their minds all conclusions formed and opinions expressed since their deliberations began almost two weeks earlier. (App. D at 279a-280a, 284a, 295a, 300a, 302a-303a, 305a-306a, 311a-312a, 318a-319a, & 324a-325a.) Notably, in the course of this inquiry, the psychiatrist's information regarding Mrs. Loescher's participation in the balloting was corroborated, at least insofar as it was learned that the jurors had formed opinions, and had cast ballots on the question of the defendants' culpability. When asked about her ability to recommence her deliberations with the alternate, one of the original jurors responded, "Do you mean all that voting and stuff—" (App. D at 294a.)

At the conclusion of the court's questioning, the court indicated its intention to seat the alternate. (App. D at 334a.) Defendants then renewed their motions for mistrial and moved to dismiss the indictment on grounds of double jeopardy. These motions were denied. (App. D at 334a-336a; App. C.) Thereafter, the alternate was seated (App. D at 337a), the jury was reinstated and sent to deliberate. (See App. D at 337a-341a.)

and my wife."); App. D at 289a (Juror Kennedy commented: "I have been very nervous the last few days. I am willing to give it a try. I can do it."); App. D at 299a (Juror Russell stated: "[I]t's kind of hard to say because . . . I would like to see my family . . . [m]y daughter has been sick."); App. D at 302a (Juror Pratt indicated he could only begin new deliberations "as long as my employer doesn't say anything."); App. D at 311a (Juror Fuentes stated: "I don't believe I can stay [away from work] such a long time . . .").

Two days later, on September 1, 1979 the jury returned its verdicts. (App. A at 33a; 690 F.2d at 1308.)

REASONS FOR GRANTING THE WRIT

The plain language of Rules 23(b) and 24(c) foreclosed the trial court from replacing a regular juror with an alternate after deliberations began. The only procedure available for continuing to verdict at that point was that provided by Rule 23(b), which allows for a verdict by a jury of less than twelve provided that the parties so stipulate in writing and the court gives its approval.

Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Fed. R. Crim. P. 23(b).

In the absence of such a stipulation, the court had no alternative but to declare a mistrial. The unambiguous directive of Rule 24(b) required the trial court to discharge the alternates after the jury retired to deliberate.

An alternate juror who does not replace a regular juror *shall be discharged* after the jury retires to consider its verdict.

Fed. R. Crim. P. 24(c) (emphasis added). Thus, under the Rules, once the jury retires the alternates' function is concluded. To substitute a discharged alternate after the deliberations have begun is to inject a stranger into the proceedings and to render the verdict invalid.

The Courts of Appeals are divided on the question whether the plain language of Rule 24(c), requiring the discharge of alternates upon commencement of deliberations, may be simply disregarded by the district courts. The Ninth Circuit's en banc decision in *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), squarely conflicts with the decision by the Eleventh Circuit panel below. Moreover, opinions of the Second, Fourth and Tenth Circuits are in apparent accord with *Lamb*, while only the Fifth Circuit and perhaps a Seventh Circuit case support the decision below. Accordingly, the Court should grant review to resolve the conflict in the Circuits, to reinstate the plain meaning of Fed. R. Crim. P. 24(c) and to prevent further erosion of the Federal Rules of Criminal Procedure through the ad hoc legislation of district courts.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CLEAR CONFLICT BETWEEN THE ELEVENTH AND NINTH CIRCUITS.

There can be no doubt that had petitioners' trial been in the Ninth Circuit, the jury would have been discharged, a mistrial declared and a new trial ordered. In *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975), the original jury deliberated for some four hours before returning a guilty verdict. The trial judge found the verdict to be inconsistent with his instructions, refused to accept it and sent the jury back for further deliberations. Shortly thereafter, one of the jurors communicated to the court that the sudden death of a co-worker rendered her emotionally unable to continue deliberating. Over the objection of defense counsel the court sent for and

seated a previously discharged alternate juror.¹⁶ The court then reinstructed the jury and told them "to 'begin at the beginning, and begin all your deliberations just as if the case had been submitted to you this instant.'" *Id.* at 1155. Shortly thereafter, the jury returned a guilty verdict. *Id.*

The Court of Appeals reversed the conviction. Based on case law, the history of Rule 24(c) and the views of various commentators, the court concluded that the Rule's unambiguous language was mandatory: "'... An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict,'" 529 F.2d at 1155 (emphasis in original). The Court stated that the Rule was founded in sound reasoning, and held that the trial court's intentional contravention of the Rule over defendant's objection required reversal. *Id.* at 1155-57. "The mandatory provision of Rule 24 having been violated, the period of time during which the substitute juror participated in the deliberations is essentially irrelevant." *Id.* at 1156 n.7.

There are no meaningful factual distinctions between *Lamb* and the instant case. Only the result is different. In each case the alternates were excused.¹⁷ In each case

¹⁶ At the time she was excused, the alternate was asked by the trial judge "to 'stand by' in case it was 'necessary for [her] to come in.'" *United States v. Lamb*, 529 F.2d at 1154-55.

¹⁷ In *Lamb* the alternate was excused and told, without more, to be available if needed. 529 F.2d at 1154-55. In *Kopituk* which, unlike *Lamb*, was a highly publicized case, the alternates were sequestered separate from the regular jurors for the first five days of the jury's deliberations and were instructed not to discuss the case with the regular jurors, the media and other specified groups. (See discussion *supra* at 4-5.) Importantly, the two alternates were not told not to discuss the case with each other. (App. D at

an alternate was recalled to substitute for a juror¹⁸ after significant deliberations had begun.¹⁹ In each case, the defendants objected.²⁰ And in each case a verdict of guilty was returned.

141a.) When alternate juror Evangelist was interrogated prior to being impanelled, the court failed to inquire about her possible discussion of the case with the other alternate. (App. D at 264a-267a.) Given the fact that the two alternates, who had spent over six months in the same courtroom hearing the same evidence, were obliged to spend five days sequestered together but apart from the deliberating jurors, it strains the limits of credulity to suppose that they would not have exchanged their views about the case with each other, particularly since the judge had not asked them to refrain from doing so. It thus seems likely that in *Kopituk* there were fourteen jurors who deliberated on the defendants' verdict, compared to the thirteen in *Lamb*.

On the fifth day of jury deliberations, the trial court in *Kopituk* excused the alternates, explaining that the problem which might have occasioned their activation had passed (App. D at 165a-167a), requested that they not discuss the case with anyone and that they "avoid the Press and television coverage in the slim possibility that we might still call you." (App. D at 166a.) Seven days later the court recalled the alternate, who claimed that she had not discussed with anyone the highly publicized case which was receiving continuing media coverage during the jury's deliberation and which had monopolized her time for the past six months.

¹⁸ In *Kopituk*, but not *Lamb*, the court questioned the remaining regular jurors as to whether they could erase all prior deliberations from their minds and start anew. See pp. 9-11, *supra*. In both cases the judge restructured the reconstituted jury and told them they must begin their deliberations as though there had been no prior deliberations. Compare App. A at 32a-34a n.14; 690 F.2d at 1307-08 n.14, with *United States v. Lamb*, 529 F.2d at 1155.

¹⁹ In *Kopituk* some twelve days passed between the time the sequestered jury began deliberations and the time the alternate was seated. (App. A at 40a-41a; 690 F.2d at 1310-11 n.17.) Approximately seven of the twelve days of sequestration involved deliberations. (See App. D at 138a, 146a, 165a, 163a, 172a.) In *Lamb* the alternate was recalled the day after deliberations began. 529 F.2d at 1155.

²⁰ In *Kopituk* the defense objected to the court's refusal to dismiss the alternates immediately after the jury retired to deliberate

[footnote continued]

In *Lamb* it was undisputed that the remaining regular jurors had already formed opinions and voted to convict. 529 F.2d at 1155. Only the court's refusal to accept their verdict as being contrary to its instructions barred conviction by the regular jury. Clearly, the eleven remaining regular jurors were in substantial agreement by the time the alternate was seated. A guilty verdict was returned twenty-nine minutes after the reconstituted jury began deliberating. *Id.* But the court explicitly concluded that the *amount of time* the substitute juror participates in the deliberations is essentially irrelevant (*id.* at 1156 n.7), and stated that the plain violation of the Rule occurs when the alternate is permitted to participate in deliberations after the original jury retires, not when the alternate participates after the jury has reached some stage in the deliberations. *Id.* at 1156 n.3.

In *Kopituk* the facts regarding the extent to which the eleven remaining regular jurors had made up their minds about the defendants' guilt by the time of the substitution are somewhat less clear than in *Lamb*. Importantly, however, in *Kopituk* the coercive pressures on the alternate may have been equally strong, but the prejudice to petitioners by reason of the court's refusal to grant a mistrial was dramatically greater. Unlike the situation in *Lamb* where all twelve regular jurors were for conviction, there is strong reason to believe that here Juror Loescher was for acquittal. The court-appointed psychiatrist who

(App. D at 141a-142a); in *Lamb* the defendant did not object to the court's directive that the alternate stand by. 529 F.2d at 1157 (Wright, J., dissenting).

In both *Kopituk* and *Lamb* defense counsel objected to the procedure of substituting the alternate after deliberations had begun and in both cases moved for mistrial. Compare App. A at 31a; 690 F.2d at 1307 and App. D at 262a, with 529 F.2d at 1155.

interviewed Mrs. Loescher reported that she constituted a minority of one on "a vote of some kind." (App. D at 244a.) The fact that the jury had in fact balloted on verdicts was established during the court's interrogation of the remaining jurors prior to seating the alternate. (See App. A at 31a; 690 F.2d at 1307 n.13; App. D at 271a, 294a.) Thus, if Mrs. Loescher had been strong enough emotionally to withstand the onus of being the lone holdout, a mistrial might have resulted.

No questions were asked of the jurors as to whether they had individually formed opinions as to guilt of the defendants, and, if so, whether their opinions were the product in whole or in part of their discussions with other jurors. (See App. D at 278a-327a.) Thus, while the jurors were superficially questioned about their ability to start anew (see pp. 9-11, *supra*), there was no probing of the effect of the deliberative process on them individually. It would be surprising if the jurors could have responded honestly that they were unaffected by the views of their fellow jurors during the prior deliberations, particularly since they had been previously instructed that:

It is the essence of the jury system that you will listen to the views of one another and that you will do so with open minds and with a disposition to accept the views of the others, if the reasons advanced are persuasive, based on the evidence and not contrary to the court's instructions on the record.

(App. D at 138a.) Indeed, the Court of Appeals conceded the obvious fact that the "further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk*, App. A at 41a; 690 F.2d at 1311.

It is readily seen that the jurors were subjected to conflicting instructions. First, they were told that the essential feature of their deliberations would be their ability to accept the reasonable views of their fellow jurors. Presumably they followed this directive for the next twelve days. Then, abruptly, they were directed to expunge everything that had occurred during these deliberations, and begin "anew."

It is beyond dispute that the Ninth Circuit would have reversed the conviction in *Kopituk* on the basis of *Lamb*.

**A. Other Courts of Appeals Would Reach the
Lamb Result and Would Disagree with the
Eleventh Circuit's Decision in This Case.**

A review of the cases dealing with violations of Rule 24(c) reveals that the Second, Fourth and Tenth Circuit Courts of Appeals would decide the case at bar in accordance with the Ninth Circuit's en banc decision in *Lamb*, while the Fifth Circuit and perhaps the Seventh Circuit would agree with the Eleventh Circuit's decision below.

In *United States v. Hayutin*, 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 1961 (1968), *subsequent appeal sub nom. United States v. Nash*, 414 F.2d 234 (2d Cir.), *cert. denied*, 396 U.S. 940 (1969), the alternates were not discharged when the jury retired to deliberate; however, there was neither communication nor contact between the regular jurors and the alternates after the jury retired to deliberate, and at no time did the alternates participate in the deliberations. 398 F.2d at 950. Because there was no contact between the alternates and the regular jurors, the court did not reverse the convictions. Nevertheless, in response to the government's argument that the alternate could be seated once deliberations had begun, the court noted that this would violate the Double Jeopardy clause:

The prejudice flows from the fact that a defendant runs the risk of being tried by more than the twelve jurors guaranteed to him by the Constitution and the Rule, or of being placed in double jeopardy by being tried by more than one jury. (*Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854).

The court concluded that since the provisions of Rule 24(c) were both unambiguous and mandatory, and the "absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24." *Id.*²¹

In *United States v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964), an alternate was permitted to sit mute in the jury room during deliberations. Although there was no evidence that the alternate disobeyed the instruction to remain mute, the Fourth Circuit reversed the conviction. 335 F.2d at 873. The court stressed the mandatory requirements of Rule 24(c), which allows substitution of an alternate only *prior* to the time the jury retires to consider its verdict and which requires that the alternates be discharged thereafter. *Id.* at 871. As the court stated, it is "most unwise to place the judicial stamp of approval upon this attempt . . . to circumvent the established rule and to substitute unauthorized

²¹ In *United States v. Viserto*, 596 F.2d 531 (2d Cir.), cert. denied, 444 U.S. 840 (1979), the court reaffirmed *Hayutin* and cautioned that "Rule 24(c) represents a national consensus of bench and bar and ought not be disturbed on a local level." 596 F.2d at 540. In *Viserto* the court, with the consent of the parties, followed a procedure wherein sixteen jurors were impanelled without any designation as regulars or alternates. Prior to deliberations the defense and prosecution were given the opportunity in turn to "strike" jurors until twelve remained. *Id.* at 539.

procedures." *Id.* at 873.²² See also, *United States v. Beasley*, 464 F.2d 468 (10th Cir. 1972), where an alternate juror inadvertently retired with the regular twelve jurors and participated in the vote to select a foreman and voted to go to lunch. After the alternate was with the jury for about twenty minutes, the court realized its mistake and discharged the alternate. The appellate court reversed, holding that the participation of the alternate in any proceedings after the jury retires to deliberate is grounds for an automatic mistrial. The court held that once the jury retires to deliberate, the alternate's presence destroys the sanctity of the jury:

Once these proceedings commenced, "the jury" consisted only of the prescribed number of jurors. *The alternate then became as any other stranger to the proceedings regardless of whether she had been discharged.* Thus the alternate juror was as any other outsider would be when she continued to sit with the jurors as they began their own proceedings. *It is apparent that this alternate, up until the critical time, was just as qualified to sit in deliberation as was any other juror, but this qualification ceased*

²² See also *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978). In a more recent case, *United States v. Evans*, 635 F.2d 1124 (4th Cir. 1980), cert. denied, 452 U.S. 943 (1981), the Fourth Circuit upheld a conviction where an alternate had been substituted after the inception of deliberations on the ground that there had been an effective waiver by defendant of his constitutional jury rights. *Id.* at 1126-27. The court was persuaded that with the defendant's knowing preference for proceeding with the alternate that the "manifest necessity to declare a mistrial had been dissipated." *Id.* at 1128. Despite the defendant's express waiver, Judge Ervin dissented on the ground that the substitution constituted plain error. *Id.* at 1129. Noting that thirteen individuals in all "did ponder the fate of Evans," Judge Ervin reasoned that defendant's constitutional right to a jury of twelve had been violated. *Id.* at 1131.

*whether or not she was discharged under Rule 24
of the Federal Rules of Criminal Procedure.*

Id. at 469 (emphasis added).

And, in *United States v. Baccari*, 489 F.2d 274, 275 (10th Cir. 1973), *cert. denied*, 417 U.S. 914 (1974), where the parties stipulated to the recall of an alternate after deliberations commenced, the court reiterated that “[r]ecall of the alternate juror without the defendants' consent would have been improper and grounds for a new trial.” The court concluded, however, that the criteria for “effective waiver of constitutional jury rights” enumerated in *Patton v. United States*, 281 U.S. 276 (1930), had been satisfied by defendants’ knowing waiver. 489 F.2d at 275.

Only the Fifth Circuit clearly would agree with the Eleventh Circuit decision in this case. Indeed, the court below reasoned that it was bound²³ by the recent Fifth Circuit decision in *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2965 & 103 S. Ct. 208 (1982), a protracted RICO prosecution which involved the distribution of controlled substances.

Phillips was similar to the instant case in all material respects except that in *Phillips* at least the alternate was sequestered until seated, and then the jury had deliberated for only two days before substitution of the alternate occurred. 664 F.2d at 990.²⁴

²³ See *United States v. Kopituk*, App. A at 35a; 690 F.2d at 1308 (citing Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452; 94 Stat. 1995 (1980)).

²⁴ Moreover, the court in *Phillips* seemed to depart from an earlier decision by the Fifth Circuit in *United States v. Allison*, 481 F.2d 468 (5th Cir.), *aff'd after remand*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974). In that case, following a procedure requested by defense attorneys, an alternate juror joined

The Seventh Circuit may also agree with the Eleventh. In *Henderson v. Lane*, 613 F.2d 175 (7th Cir.), *cert. denied*, 446 U.S. 986 (1980), the Seventh Circuit rejected a collateral attack on a state court conviction of a defendant where an alternate had been substituted for an ailing juror after two and one-half hours of deliberations. Noting the "brief separation" of the alternate from his former colleagues, the court minimized the argument that the dismissed and reactivated alternate was analogous to a stranger to the proceedings. 613 F.2d at 178. The court disposed of defendant's constitutional argument on the grounds that non-unanimous verdicts in state prosecutions are constitutionally permissible. *Id.* at 178 (citing *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972) (opinion of White, J.)). Finally, the court observed that while defense counsel did not consent to the substitution, neither did he object, remarking that he saw "no alternatives" to the procedure adopted by the trial judge. 613 F.2d 179. Of course, the Seventh Circuit had no occasion in *Henderson* to address Fed. R. Crim. P. 24(c).

Accordingly, the majority of the Circuits that have faced questions similar to that presented in the instant

the regular jurors during the first portion of deliberations until the court could determine whether one of the regular jurors was well enough to continue deliberations. The alternate was instructed not to participate with the regular panel. The case was remanded for an evidentiary hearing to determine whether there was a reasonable possibility of prejudice from the alternate's *mere presence* during deliberations. The court said:

The provision of Rule 24(c) that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict" is a mandatory requirement that should be scrupulously followed. Because any benefit to be derived from deviating from the Rule is unclear and the possibility of prejudice so great, it is foolhardy to depart from the explicit command of Rule 24.

petition would seem to agree with the Ninth Circuit's decision in *Lamb* rather than the Eleventh Circuit's decision in *United States v. Kopituk*.

II.

THE RATIONALE FOR ENFORCING THE REQUIREMENTS OF RULE 24(c) IS PERSUASIVE.

A. The Commentators

Prestigious legal commentators have supported the proposition that such ad hoc revision of the mandate of Rules 24(c) as by the trial court below is unwise, unfair and probably unconstitutional. In 1941 the Federal Rules Committee tentatively proposed a rule permitting substitution of an alternate after commencement of deliberations. When the proposal was submitted to this Court for approval, the Court asked, "[h]as the Committee satisfied itself that it is desirable or constitutional that an alternate juror may be substituted after the jury has retired and begun its deliberations?"²⁵ Lester B.

²⁵ Indeed, the New York Court of Appeals struck down just such a proposal on constitutional grounds:

After the case was submitted to the jury the alternate juror was kept separate and apart from the 12 jurors who were engaged in discussing the evidence and deliberating the verdict. It was only after some five hours of deliberations, when one of the regular jurors was excused, that the alternate juror was permitted to enter the jury room and take part in the discussions. During that five-hour period the alternate "cease[d] to function as a juror."

* * *

We believe that the Constitution of this State, as it has been construed, prohibits the substitution of an alternate juror—in effect a 13th juror—after the jury has begun its deliberation. While it may be difficult in an individual case to evaluate the extent to which a defendant may be prejudiced by such a substitution, we believe that, once the

[footnote continued]

Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1961). Thereafter, the provision for seating an alternate after deliberations had begun was dropped from the proposal.²⁶ Furthermore, the Advisory Committee on the Criminal Trial rejected such a provision because "it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of the prior group discussion." 3 *A.B.A. Standards for Criminal Justice* § 15-2.7, at 15.74 (2d ed. 1980).

The Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure has recently reasoned:

The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear

deliberative process has begun, it should not be disturbed by the substitution of one or more jurors who had not taken part in the previous deliberation and who had "cease[d] to function as" jurors.

People v. Ryan, 19 N.Y.2d 100, 104, 278 N.Y.S.2d 199, 202-03, 224 N.E.2d 710, 712 ((1966) (citation omitted). *Accord State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982).

Contra, *People v. Collins*, 17 Cal. 3d 687, 552 P.2d 742, 131 Cal. Rptr. 782 (1976), cert. denied, 429 U.S. 1077 (1977) (California Supreme Court held that substitution, pursuant to provision of California Penal Code, of alternate juror after commencement of jury deliberations was proper under California Constitution); *State v. Miller*, 76 N.J. 392, 407, 388 A.2d 218, 225 (1978) (New Jersey Supreme Court held that substitution of alternate juror after one hour and fifteen minutes of deliberations did not offend guaranty of trial by jury under the New Jersey Constitution, although court observed "[t]he longer the period of time the jury deliberates, the greater is the possibility of prejudice should a juror be substituted or replaced").

²⁶ See Lester B. Orfield, *Criminal Procedure Under the Federal Rules*, § 24.1, at 86-99 (1966).

to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations.

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, "Proposed Amendments to the Federal Rules of Criminal Procedure: Preliminary Draft," 30 *Cr. L. Rptr.* 3001, 3013 (1981). Thus, the Committee rejected a revision of Rule 24 to allow substitution of an alternate after deliberations have begun. *Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure*; Agenda G-7, at 3 (September 1982) ("[P]roposed Rules 24(c) and (d) were abandoned.") In rejecting the revision, the Committee noted that its judgment was in accord with that of most commentators and many courts. *See also* 30 *Cr. L. Rptr.* 3001, 3012-13 (1981).

For example, as noted by Professor Wright:

There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These doubts are as forceful now as they were when they were first voiced. To permit substitution of an alternate after deliberations have begun would

require either that that alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

2 Wright, *Federal Practice and Procedure (Criminal)* § 388, at 392-93 (2d ed. 1982) (footnotes omitted).

Further, it has been observed that

Were the Rule not couched in mandatory language it would invite certain impermissible effects. The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict.

8A *Moore's Federal Practice* ¶ 24.05, at 24-59 (2d ed. 1982) (footnote omitted). See also Hon. Damon J. Keith, "Trial and Post Trial Problems," 75 F.R.D. 359, 360 (1976).

B. The Practical Effects of Departure from the Mandate of Rule 24(c) Outweigh the Benefits.

Empirical research suggests that an alternate juror substituted during the course of jury deliberations may not be able to function as an effective and independent member of the jury. For example, the landmark studies of psychologist Solomon Asch demonstrate that newcomers to a group will frequently alter their judgments in accordance with what they perceive to be the group consensus, even if the group's perception of data is wrong and the newcomer has previously supplied a

correct perception of the same data.²⁷ Recent studies have further demonstrated that individuals will gear their behavior to their expectations of forthcoming group behavior, even if the group consensus has not yet been expressed.²⁸

Sociologists also concur that it is difficult for newcomers to a group, particularly those with external status disadvantages such as would accompany an alternate juror, to attract the group's attention to their views.²⁹ Moreover, sociologists have concluded that once a group organization has been adopted, as it would have been in the course of the original jury's 12 days of sequestration, the addition of a new member to the group would be unlikely to alter the state of the group's organization.³⁰

As the court below was obliged to acknowledge, "the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew." *United States v. Kopituk*, App. A at 41a; 690 F.2d at 1311.³¹ It must be recognized that few jury deliberations proceed much "further along" than twelve days. At some point

²⁷ S. E. Asch, "Effects of Group Pressure Upon the Modification and Distortion of Judgments," reprinted in *Groups, Leadership and Men: Research in Human Relations* (Guetzkow, H. S. ed. 1957). See also discussion of Professor Asch's studies in Lempert, "Uncovering Nondiscernible Differences: Empirical Research and the Jury-Size Cases," 73 *Mich. L. Rev.* 644, 673-79 (1975).

²⁸ Sheehan, J., "Conformity Prior to the Emergence of a Group Norm," 103 *J. of Psych.* 121 (1979).

²⁹ C. Ridgeway, "Conformity, Group-Oriented Motivation, and Status Attainment in Small Groups," 41 *Soc. Psych.* 175, 181 (1978).

³⁰ T. M. Mills, *Group Structure & the Newcomer: An Experimental Study of Group Expansion* at 26 (1966).

³¹ See also, *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978), discussed *supra* at note 25.

the "difficulty" of the jury's function must cross the threshold to a practical impossibility. To expect of a jury that which our common sense and experience dictates is beyond the capacity of the ordinary person is wrong. To countenance the assumption that the eleven regular jurors here were able to perform the superhuman feat upon which the decision below is premised is to countenance a fiction.

C. Failure to Halt the Ad Hoc Modification of Rule 24(c) Will Result in Uncertainty, Confusion and Unfairness.

In their wisdom, those responsible for promulgating Rule 23 of the Federal Rules of Criminal Procedure determined that in cases where one or more members of a deliberating jury become incapacitated the deliberations may proceed only by express written stipulation of the parties to a jury of less than twelve, and then only with the approval of the court. *See Fed. R. Crim. P. 23(b).* The language of Rule 24(c) was evidently designed to foreclose the possibility that an alternate juror would have any legal function once the jury retires to consider its verdict.

Departure from the rules must necessarily create confusion and uncertainty.³² The *ex post facto* legitimization by the court below of the trial court's ad hoc revision of Rule 24(c) does violence to the concept of uniformity of treatment which the rules are promulgated to ensure. The Court of Appeals stated:

It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is "the rule" and

³² See *United States v. Hayutin*, *supra*, 398 F.2d at 950; *United States v. Viserto*, *supra*, 596 F.2d at 540; *United States v. Evans*, *supra*, 635 F.2d at 1131-1132.

the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in *extraordinary* situations and, even then, only when *extraordinary* precautions are taken, as was done below, to ensure that the defendants are not prejudiced.

United States v. Kopituk, App. A at 42a-43a; 690 F.2d at 1311 (emphasis added).

The exception carved out of the Rule by the Eleventh Circuit panel can lead only to confusion and to the undermining of petitioners' constitutional rights to a fair trial by a jury of twelve.

This judicial amendment to Rule 24(c) renders it impermissibly vague.³³ What is an "extraordinary circumstance"? When does a case become "extraordinary"? What are "extraordinary precautions"? How can the court truly ascertain whether the defendants have been prejudiced? When dealing with rights so fundamental as those relating to trial by jury such tinkering cannot be condoned.

Although trials as protracted as the one here are unusual, it must be expected that trial courts will attempt to justify the use of the device here employed in the name of judicial economy in situations involving much shorter trials. While it would be impossible to compile statistics demonstrating the frequency with which the *Phillips/Kopituk* rule revision has been used by trial courts in the Fifth and Eleventh Circuits, one recent example of use by the former Chief Judge of the United States District Court for the Southern District of Florida,

³³ Cf. *Winters v. New York*, 333 U.S. 507, 509-510, 515 (1948); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Cole v. Arkansas*, 338 U.S. 345, 354 (1949).

the trial of an "ordinary" fraud case lasting some twelve days, is provided for purposes of illustration.³⁴

In that case, the court advised the two alternates after the jury retired that they were not "through," that if it became

necessary to excuse any of the deliberating jurors, you will be called to replace that deliberating juror or jurors and the deliberations would start all over again anew and you will be a participant at that instance in the deliberations. And, ultimately and hopefully, you will participate in the verdict that is reached.

For that reason, I must preserve you. . . . It is a new procedure that is now available under a Fifth Circuit decision. And we think it is a very good one because it means almost two weeks are not wasted if something should happen, God forbid, to one of the jurors.

(App. E at 344a.)

However trial judges may feel the pressure of heavy dockets, the right of defendants to the equal application of the rules must not be compromised.

CONCLUSION

For the reasons stated herein the petition for certiorari should be granted.

Respectfully submitted,

RICHARD BEN-VENISTE, ESQUIRE
IRVING ANOLIK, ESQUIRE

³⁴ *United States v. Entman*, No. 82-326-Cr-CA (S.D. Fla., Jan. 19, 1983) (App. E).

82-1538

No.

U.S. Supreme Court, U.S.
FILED

MAR 15 1983

ALEXANDER L STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LANDON L. WILLIAMS, WILLIAM BOYLE
AND GEORGE BARONE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO
**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

RICHARD BEN-VENISTE, ESQUIRE
BEN-VENISTE & SHERNOFF
4801 Massachusetts Avenue, N.W.
Suite 400
Washington, D.C. 20016
(202) 966-6000

IRVING ANOLIK, ESQUIRE

20 Vesey Street
New York, New York 10007
(212) 732-3050

Counsel for Petitioners

(i)

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APPENDIX A

UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

No. 80-5025

United States of America,
Plaintiff-Appellee,

v.

*Dorothy O. Kopituk, Raymond C. Kopituk, Oscar
Morales, Fred R. Field, Jr., Cleveland Turner, James
Vanderwyde, Landon L. Williams, William Boyle,
George Barone,*

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

S. Michael Levin, Sp. Atty., U.S. Dept. of Justice,
Miami, Fla., William C. Bryson, Atty., Dept. of Justice,
Washington, D.C., for U.S.

Leib & Martinez, Karl J. Lieb, Jr., Coral Gables, Fla.,
for Kopituk & Morales.

Kogen & Kogan, Geoffrey C. Fleck, Loren H. Cohen,
Miami, Fla., for Field.

Flynn, Rubio & Tarkoff, Michael H. Tarkoff, Miami,
Fla., for Turner.

Varon & Stahl, Joseph A. Varon, Hollywood, Fla., for Vanderwyde.

Mahon, Mahon & Farley, Lacy Mahon, Jr., Jacksonville, Fla., for Williams.

Michael A. Masin, Richard M. Gale, Miami, Fla., for Boyle.

Rosen & Rosen, E. David Rosen, Miami, Fla., for Barone.

November 4, 1982

Before HILL and CLARK, Circuit Judges, and SCOTT,* District Judge.

CHARLES R. SCOTT, District Judge:

Appellants, waterfront union officials and employers, were convicted in the United States District Court for the Southern District of Florida on numerous charges arising from their participation in a widespread pattern of corruption aimed at securing control of the business activity at several major ports in the Southeastern United States. The evidence adduced at the seven-month trial¹ revealed an extensive, well-orchestrated conspiracy spanning a period of more than 10 years in which union officials pressured waterfront employers to make illegal payoffs in return for assured labor peace and lucrative business contracts.

In 1975, the Federal Bureau of Investigation ("FBI") began an extensive undercover investigation of the

* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation.

¹ The trial commenced on January 28, 1979, and continued to September 1, 1979.

corrupt enterprise when Joseph Teitlebaum, a waterfront employer who had participated in the conspiracy for several years, agreed to cooperate with the government. With Teitlebaum's assistance, FBI agents successfully infiltrated the enterprise and obtained tape-recordings of conversations transpiring in the course of illegal payoff transactions. The covert investigation continued until January 1977 when the case became public with the issuance of grand jury subpoenas.

On June 7, 1978, a federal grand jury, sitting in Miami, Florida, returned a 70-count, 128 page indictment charging appellants and others² with a variety of offenses including: racketeering, 18 U.S.C. § 1962(c); conspiracy to engage in racketeering, 18 U.S.C. § 1962(d); payment and receipt of money and other articles of value in exchange for labor peace, 29 U.S.C. § 186; extortion, 18 U.S.C. § 1951; receipt of kickbacks in connection with a labor matter, 18 U.S.C. § 1954; obstruction of justice, 18 U.S.C. § 1503; and filing false income tax returns, 26 U.S.C. § 7206.

TEITLEBAUM

Joseph Teitlebaum was the government's "star" witness at trial.³ Teitlebaum's involvement in the con-

² Twenty-two persons were charged in the indictment. Eight defendants (Robert Bateman, Alvin P. Chester, Jeremy Chester, Francesca Cotrone, Joseph Cotrone, Laura Cotrone, Sebastian "Benny" Cotrone and Vincent James Fiore, Jr.) entered guilty pleas prior to trial. Three defendants (Neal L. Harrington, Max Forman and Cornelius "Butch" Vanderwyde) were severed. Defendant Elizah Jackson was acquitted and the jury was unable to reach a verdict with respect to defendant Isom Clemon. All of the nine defendants against whom guilty verdicts were returned have joined in this appeal.

³ Because six of the nine appellants (Dorothy Kopituk, Raymond Kopituk, Oscar Morales, Fred Field, James Vanderwyde and [footnote continued]

spiracy was extensive and long-lasting and, as such, his testimony constituted the backbone of the government's case.

In the 1960's, Teitlebaum was a vice-president of Eagle Shipping, Inc., a company that performed stevedoring⁴ services at the port of Miami. In 1966, Teitlebaum met appellant Fred R. Field, Jr. at a labor negotiation meeting in Miami. Field, who was General Organizer of the International Longshoremen's Association ("ILA"), asked Teitlebaum if they could talk privately somewhere. (9:83).⁵ Teitlebaum arranged to use a friend's boat to take Field on a fishing trip. Field brought three other union officials with him on the trip, including Benny Astorino. (9:84-85).

At one point on the trip, Astorino told Teitlebaum that Field was coming to Miami to establish a new checkers'⁶ union and that it would be in Teitlebaum's "best interest" to do business with Field. He added that Teitlebaum could demonstrate his "good faith" by paying him \$3,000. (9:87-88). Teitlebaum testified that Field was sitting about eight feet behind him and Astorino, looking at Teitlebaum, while the conversation was taking place. (9:86).

Landon Williams) challenge the sufficiency of the evidence supporting their convictions, it is necessary to review the evidence, particularly as it relates to those appellants, in some detail.

⁴ "Stevedoring" is the process of loading and unloading ships.

⁵ References to the trial transcript will be cited as "(____:____)," the first number representing the volume of the transcript and the second number representing the particular page cited to.

⁶ "Checkers" are persons employed by stevedoring companies who monitor or "check" cargo as it is loaded or unloaded from a ship.

Teitlebaum responded that he would have to discuss the matter with his father and uncles, who were responsible for running Eagle, Inc. (which owned Eagle Shipping, Inc.) (9:89). Shortly after returning from the fishing trip, Teitlebaum received telephone calls from two of his customers.⁷ (9:91). The next day, Teitlebaum received a telephone call from Field in which Field asked him if he had "had a change of heart about the three aces." (9:92). Teitlebaum told him that he had not and that he did not appreciate Field pressuring his customers to persuade Teitlebaum to sign a union contract. (9:92). Field responded, "Listen, prick, you'll sign the contract and like it." (9:93). Teitlebaum ultimately signed the contract.

The next stage of Teitlebaum's involvement in the criminal enterprise did not commence until 1972.⁸ Throughout the intervening years, Teitlebaum had come to know appellant George Barone, president of the checkers' union in Miami (ILA Local 1922), appellant William Boyle, secretary-treasurer of ILA Local 1922, appellant James Vanderwyde, office manager of ILA Local 1922, and appellant Cleveland Turner, president of the longshoremen's union in Miami (ILA Local 1416).

In 1972, Teitlebaum purchased a 90-ton crane to be used for loading and unloading ships and formed M & M Crane Co. Within a week after the crane was brought to the Dodge Island Seaport at the port of Miami, someone had vandalized it. (9:110). Shortly thereafter, Teitle-

⁷ Teitlebaum was not permitted to discuss the content of the telephone conversations inasmuch as the statements made by the callers constituted hearsay not subject to any exception enumerated in *Fed. R. Evid.* 803, 804.

⁸ Teitlebaum assumed full control of Eagle, Inc. in 1972.

baum received a visit from co-defendant Sebastian "Benny" Cotrone. Cotrone advised Teitlebaum that he should "make . . . peace" with appellant Barone if he wished to stay in business. Cotrone told Teitlebaum that "they" wanted "a piece of the action from the crane." (9:112). Teitlebaum subsequently began leasing the crane to Marine Terminals, Inc. ("MTI"), a waterfront company managed by George Wagner, who had close ties to the union. (9:128). Wagner was paid a kickback of \$15 for every hour of crane use billed to MTI. (19:93-94).

In early 1972, Teitlebaum contacted appellant Boyle about obtaining a contract to perform stevedoring services for the Mardi Gras, a passenger ship owned and operated by the Carnival Cruise Lines. (19:109). Boyle said that he would talk with "the boys" and let Teitlebaum know if it could be done. A couple days later Boyle informed Teitlebaum that he could have the contract, but that it would cost him "two big ones and a free cruise every now and then." (19:109). Teitlebaum agreed and his company subsequently obtained the contract. He paid Boyle \$2,000 in installments of \$200 per week. (19:123).

When it became apparent to Teitlebaum that it was necessary to reduce the number of porters assigned to work on the Mardi Gras in order to save money, Teitlebaum presented the problem to Boyle, who in turn told Teitlebaum to contact appellant Cleveland Turner, president of the Miami longshoremen's union. Teitlebaum did so and worked out an agreement to pay Turner \$50 per week to reduce the number of porters assigned to the dock. Turner told Teitlebaum to talk with the head porter on the dock and to have the head porter call Turner if there was any problem. Teitlebaum made payoffs to Turner from 1972 to 1976. (19:114).

At one point in early 1972, Boyle told Teitlebaum that Teitlebaum's cousin owed the union between \$1,800 and \$2,000 in delinquent health insurance and dues payments and that it would be in Teitlebaum's best interest to pay the debt on his behalf. (19:95). Teitlebaum agreed to pay the debt. In October or November of 1972, after the debt had been paid, appellant James Vanderwyde told Teitlebaum: "You did a nice job paying off your cousin's debt. Don't let it stop." Teitlebaum asked him what he was talking about, to which Vanderwyde responded: "Are you stupid? We're going to have control of this fucking port right here. Control. That's what counts, control." (19:128). Teitlebaum testified that while he was saying this, Vanderwyde made a fist and gritted his teeth. (19:128).

Approximately one week after his conversation with Vanderwyde, Teitlebaum saw Boyle at the Dodge Island Seaport. Boyle told him that he was going to have to start paying the union \$200 per week, but that he would receive additional business for doing so. Boyle made specific reference to the Siboney, a cargo ship operated by Ocean Trailer Transport, Inc. (19:129). Teitlebaum agreed that if he acquired the Siboney contract, he would pay Boyle the \$200 per week. (19:129).

Teitlebaum did obtain the Siboney contract and began making the weekly payments to Boyle. He was frequently late in making the payments, however, prompting Boyle to tell him on one occasion that "[i]f the little guy for George found out that you were late, you would have a lot of trouble." (19:209). Boyle identified the "little guy" as appellant Vanderwyde. (19:209).

In late 1973, Teitlebaum met with Boyle at the Miami ILA office and told him that he was interested in improving his company's position by acquiring a contract

to service either the Mamenic Line or Gran Columbiana Line. Boyle responded that Teitlebaum should speak with appellant Field about it. (10:13). That evening Field visited Teitlebaum's office and Teitlebaum reiterated his interest in the Mamenic and Gran Columbiana lines. Field told Teitlebaum that the Mamenic contract would be the easier of the two to acquire. Teitlebaum expressed concern because he knew of a Mamenic representative that was working for a competing stevedoring company, but Field told Teitlebaum not to worry, stating that the representative could "be taken care of." (20:14). Teitlebaum reported to appellant Barone that Field had promised to help him acquire the Mamenic account. Barone said he would check into it and subsequently gave Teitlebaum instructions as to whom he should contact regarding the account. Teitlebaum's company entered into a contract to perform stevedoring services for the Mamenic Line in June 1974. (20:21-23). As payment for the assistance he received in acquiring the Mamenic account, Teitlebaum, at Boyle's request, purchased three pairs of cruise tickets and gave them to Boyle. (20:29-30).

Later in 1974, Teitlebaum learned that Harrington & Co., a competing business operated by co-defendant Neal L. Harrington, was submitting bids to perform stevedoring work for Nopal Line, a Norwegian steamship company, which was already one of Teitlebaum's customers. Teitlebaum complained to Boyle about the fact that he was paying \$200 per week and that he expected his accounts to be protected. Boyle said he would "talk to the boys" and take care of the matter. (20:36). Shortly thereafter, Barone, in Vanderwyde's presence, told Teitlebaum that Harrington & Co. would withdraw its bid. (20:37-38). Teitlebaum's company retained Nopal's business.

In early 1975, Teitlebaum expressed to Boyle his interest in acquiring a contract to do business with Puerto Rico Marine Management, Inc. ("PRMMI"). Boyle once again said he would "talk to the boys" about it. (20:62). Approximately one week later, Teitlebaum ran into Barone in the hallway outside Teitlebaum's office and reiterated his desire to obtain the PRMMI contract. Barone rubbed his foot on the floor, picked up his trouser leg and said, "Heavy." (20:63). Teitlebaum testified that Barone had done precisely the same thing when Teitlebaum received the Siboney contract.

The next day Teitlebaum met with Boyle who told him it would cost "five up front" for the PRMMI contract. Teitlebaum asked whether he meant "big ones or little ones," to which Boyle responded, "Big ones." Teitlebaum asked what his guarantee was and Boyle replied, "If you don't get this one, the next big one belongs to you." (20:64). Either that same day or the following day, Teitlebaum gave Boyle \$5,000 in \$100 bills. (20:67). Teitlebaum, however, did not get the PRMMI contract.

In the summer of 1975, Boyle told Teitlebaum that he wanted some cruise tickets for appellant Vanderwyde and for appellant Landon Williams, president of ILA Local 1408 in Jacksonville, Florida. Boyle told Teitlebaum that Williams wanted to give the tickets to the son of the mayor of Jacksonville as a wedding present. (20:71). Teitlebaum accommodated the request by obtaining three sets of tickets from the Commodore Cruise Line, one of Teitlebaum's customers. (20:72). Teitlebaum's company paid for all the tickets. (20:76).

In September 1975, Teitlebaum was arrested on state charges of solicitation to commit murder, conspiracy to commit murder and attempted murder. (20:80). In

return for his pledge to cooperate with the government in the instant matter, he was permitted to enter a plea of nolo contendere to the misdemeanor charge of solicitation to commit murder and the other charges were dropped. (20:80). He received a sentence of one-year probation.⁹ From the time of his arrest until conclusion of the investigation, Teitlebaum worked closely with FBI agents in an effort to gather direct evidence of the corrupt enterprise operating on the waterfront.

In the latter part of 1975, Barone told Teitlebaum, in Vanderwyde's presence, that he should "take Savannah" and that Boyle would tell him what to do. (21:31). Accordingly, Teitlebaum set up a company called Georgia Container Agencies to operate at the port of Savannah, Georgia. (21:35). Georgia Container Agencies was to receive a lucrative contract from Zim-Israel Navigation Co., Ltd., an Israeli steamship line. In return for the Zim contract in Savannah, however, Boyle told Teitlebaum that he would have to surrender another account. Teitlebaum told Boyle he would give up the Mamenic account and Boyle said that would be acceptable, stating that he would tell "the fat man" about Teitlebaum's selection. (21:41). Teitlebaum testified that he knew from previous reference that the fat man was appellant Field. (21:42).

In December 1975, Boyle informed Teitlebaum what it would cost for the Zim contract in Savannah: \$15,000 "front money," one percent of the value of all ocean freight handled, \$12 for each container loaded or unloaded from a ship and 50 cents per ton for bulk cargo. (21:124-126). Teitlebaum agreed to pay the \$15,000

⁹ The charges stemmed from Teitlebaum's attempt to arrange a contract killing of a business associate in South America. As part of the arrangement, Teitlebaum specified that the murder was to be committed with an ice pick. (26:213, 220, 228).

front money to Boyle in 10 installments of \$1,500 each. (21:131). Teitlebaum made several of the \$1,500 Savannah payments to Boyle, occasionally using money provided by the FBI.

In January 1976, Teitlebaum travelled to Savannah with Boyle for the purpose of meeting co-defendant Elizah Jackson, president of ILA Local 1414 in Savannah, to determine how much money was going to have to be paid to Jackson. (22:11). Boyle negotiated with Jackson privately and then told Teitlebaum it would cost \$300 "up front," \$50 per week, and an additional \$50 for each ship serviced. (22:25).

Using a tape recorder fitted into his boot by FBI agents, Teitlebaum was able to record some of the conversations that transpired in the course of making the Savannah payments, as well as other payments. Teitlebaum stopped carrying the tape recorder, however, following a February 1976 incident which indicated the defendants may have been getting suspicious of him. On February 11, 1975, Boyle summoned Teitlebaum to the ILA office in Miami. When he arrived Boyle was waiting for him along with co-defendants Vincent James Fiore, Jr. and Cornelius "Butch" Vanderwyde.¹⁰ Boyle told Teitlebaum, "Take off your shoes, get comfortable." Teitlebaum testified that he became extremely nervous. He took off his shoes, pulled out his pockets and said, "What's wrong with you?" Boyle simply said, "Everything is fine." (22:118). Teitlebaum related the incident to FBI Special Agent Ray Maria and it was decided that Teitlebaum would no longer wear a body recorder. (22:120).

¹⁰ Cornelius "Butch" Vanderwyde is the son of appellant James Vanderwyde.

In April 1976, Teitlebaum visited the ILA office in Miami to give Boyle one of the weekly "peace" payments. Boyle was not there so Teitlebaum gave the money to appellant Vanderwyde. Vanderwyde complained that Teitlebaum was getting too far behind on his payments and said that he wanted at least \$500 more. Teitlebaum went next door to his office and borrowed \$500 cash from his uncle and his cousin. He returned to the ILA office and gave the money to Vanderwyde. Vanderwyde patted him and said, "Good boy." (24:21-22).

Vanderwyde then told Teitlebaum that he wanted to take a cruise and said he needed six pairs of tickets. (24:23). The following month Boyle gave Teitlebaum a list containing the names of persons who wanted to take a cruise in June on the Mardi Gras. Included on the list were Boyle and his wife and Vanderwyde and his wife. (24:37-38). Teitlebaum purchased the tickets for them. (24:113).

In June 1976, Teitlebaum and representatives of the Zim steamship line discussed the possibility of Georgia Container Agencies, Teitlebaum's Savannah company, performing waterfront services for the Zim line in Mobile, Alabama. Teitlebaum went to Boyle to discuss how much it would cost him to expand into Mobile and Boyle estimated that it would cost \$5,000 up front under the same operating conditions that were in effect in Savannah. (24:50). Shortly thereafter, Boyle informed Teitlebaum that appellant Field had contacted co-defendant Isom Clemon, president of ILA Local 1410 in Mobile, and made arrangements for Teitlebaum to meet Clemon. (24:72).

On June 11, Boyle flew to Mobile and was met by Clemon at the airport. Clemon told Teitlebaum that

"he was the man in Mobile," that Boyle had told him to "take care" of Teitlebaum, and that "he [Clemon] liked his little white envelope." At a later meeting with Clemon in Mobile, Teitlebaum, in the presence of FBI Special Agent Richard Artin (who was posing as an employee of Teitlebaum's), paid Clemon \$400 while they were driving to a restaurant to have lunch. (24:138-140). At the restaurant, Clemon told Teitlebaum and Artin that he would not even be talking with them if he had not received an "okay" from Boyle or Field. (24:141). After that meeting, Agent Artin continued to make payments to Clemon. (38:175; 39:30).

Subsequent to Teitlebaum's first meeting with Clemon, Boyle informed him that "Freddie [appellant Field] underestimated the price" for expanding into Mobile and that it would cost \$10,000 up front rather than \$5,000. (24:84-85). Teitlebaum was told that he could satisfy this obligation by making five \$1,000 weekly installment payments, waiting 30 days, and then making five additional \$1,000 weekly payments. (24:97).

In July 1976, a business associate of Teitlebaum's contacted him regarding a company that wished to move four trailer loads of cigarettes through the port of Miami without having the cigarettes unpacked and then repacked ("stripped" and "stuffed") by union dockworkers as was required under the union contract. Teitlebaum explained the situation to Boyle who said that the cigarettes could move through untouched if the shipper agreed to pay an extra \$200 per load. The shipper so agreed and the \$800 was incorporated into a special invoice as "extra handling" charges. (24:146-148). The same arrangement was followed with regard to another shipment of cigarettes later in the year. (25:136-137).

Throughout this period, Teitlebaum continued making payments to appellant Cleveland Turner, alternately with cash, cruise tickets and even automobile tires. In August 1976, Teitlebaum delivered a \$200 check to Turner, but as he was leaving Turner ran out to Teitlebaum's car and gave him the check back, saying he wanted only cash from then on. Teitlebaum took back the check and gave Turner \$160 in cash that he was carrying. (24:176).

In the latter part of August 1976, Boyle told Teitlebaum that Barone was angry at him for using South-eastern Maritime, Inc. as a stevedoring company in Savannah because it "belong[ed] to another group." (24:185, 194). Subsequently, Teitlebaum met with Boyle and Barone in the hallway outside of his Miami office and Barone told Teitlebaum that he "was going to work with whomever he [Barone] designated" and that Teitlebaum was going to love every goddam piece of business . . . [he] had." (24:196-197).

During this period, Teitlebaum was continuously behind in the money he owed and Boyle, Barone and Vanderwyde pressured him to catch up. When Teitlebaum received a \$25,000 payment from the Zim line for services rendered in Savannah, Boyle told Teitlebaum that he wanted \$2,000 out of it. (24:102). When Teitlebaum asked if he could deduct the cost of the June 1976 cruise tickets from the money he owed, Boyle told him to consider the tickets as a present for Vanderwyde. (24:114). At one point, Boyle told Teitlebaum that it would "relieve a lot of tension" if Teitlebaum were to make payments of \$3,500 for Mobile, \$1,000 for Savannah and \$1,000 for Miami. (24:193). Shortly thereafter, Barone told Teitlebaum, in the presence of Boyle and Vanderwyde, to "get even in Mobile." (25:36). Barone asked Teitlebaum if he was

experiencing any problems with the Nopal Line. When Teitlebaum said that he was not, Barone told him, "you may start experiencing some problems." (25:36-37).

In early September 1976, Boyle told Teitlebaum that Field wanted tickets for himself and some friends to take a Christmas cruise on the Mardi Gras. (25:25). In early December, Teitlebaum visited the ILA office and Boyle (in the presence of Field, Barone, appellant Vanderwyde and Cornelius Vanderwyde) asked Teitlebaum if he had made arrangements for Field's tickets. Teitlebaum said that the tickets cost \$6,200 and the cruise line who operated the Mardi Gras was not going to give them away because it was the Christmas cruise. (25:152). Teitlebaum called his friend at the cruise line to let Boyle speak with him. Teitlebaum heard Boyle telling the person: "You know who he is. He is our general organizer." (25:156). After a pause, Boyle added, "When contract time comes around, don't look for any favors." (25:156).

Boyle then handed the phone back to Teitlebaum who tried to persuade the cruise line representative to split the cost of the tickets with him. (25:156). At that point Field looked at Teitlebaum and said: "Fuck you and your Jew friend. I am not going. You'll repent. Believe me, you'll repent." (25:157).

In the latter part of 1976, Teitlebaum spoke with Boyle about the possibility of expanding his waterfront operations into the port of Jacksonville, Florida. (24:161). In October, Teitlebaum made arrangements to meet appellant Landon Williams for dinner in Miami. (25:48). They met in the lobby of the Americana Hotel and discussed the Jacksonville operation. Williams told Teitlebaum that it would cost him "[t]en cents a ton,

\$250 a week, \$1,000 a month, no matter what does," in order to operate in Jacksonville. (25:55).

En route to the restaurant Teitlebaum gave Williams \$400. (25:80). Williams held up five fingers and said, "I was looking for this." Teitlebaum told him that he would receive the additional \$100, plus the first monthly payment of \$1,000 when they met in Jacksonville. (25:81). Teitlebaum started to discuss the cruise tickets he had obtained for Williams in 1975, but Williams said he did not like to talk in cars because they could easily be bugged. (25:81). Shortly after the Miami meeting, Teitlebaum travelled to Jacksonville where he paid Williams the \$1,100, using money supplied by the FBI. (25:96).

OTHER WATERFRONT EMPLOYERS MAKE ILLEGAL PAYOFFS

While Joseph Teitlebaum was the government's key witness, other waterfront employers also testified that they made illegal payments to union officials.

Alvin P. Chester was one of the principals of Chester, Blackburn & Roder ("C, B & R"), a company that rendered steamship agency services at the port of Miami. In 1967, the principals of C, B & R formed Marine Terminals, Inc. ("MTI"), a stevedoring company. Chester testified that he met appellant Barone in 1967 shortly after MTI was established. (14:120). Barone told Chester that he had done him a favor by interfering with an attempt to execute a murder contract on one of Chester's business associates. Chester testified that Barone told him Joseph Teitlebaum was responsible for the contract. (14:122).

Barone explained to Chester that life was different on the docks and that Chester needed a "consultant" to

"watch out for things." (14:123). Accordingly, Barone suggested that MTI enter an "arrangement" with Barone whereby the company would pay him a monthly retainer of \$1,500. (14:124). Chester said that was too high and they ultimately agreed that MTI would pay Barone \$750 each month. (14:124). Chester made the first two payments himself, but his associate Jacob Sklaire made the subsequent payments. (14:195-197).

Sklaire testified that he continued paying Barone \$750 each month from 1967 through 1972. In 1972, Sklaire and his associates formed Caribbean Freightways, Inc., a freight consolidating business, to operate at the Miami International Airport. (14:204-205). The function of the business was to receive freight from several different companies and pack ("stuff") it into containers destined for different ports.

Sklaire asked Barone whether it would be possible to obtain a union contract for the airport operation inasmuch as containers stuffed by non-union personnel that passed through the port were subject to a substantial financial penalty. (14:206). Barone responded negatively, stating that they were not going to award any more union contracts. Nevertheless, Sklaire and Barone arrived at an agreement whereby Barone would permit Sklaire to use non-union personnel without incurring any penalty in return for increasing Barone's monthly payment to \$1,000. (14:209). The \$1,000 payments continued until January 1977. (14:211).

George Wagner began working as a checker for MTI in 1967. (43:35). In 1968, the principals of MTI approached Wagner regarding the possibility of him becoming a manager. (43:41). Wagner, concerned that he might lose his union status if he accepted the job,

discussed the matter with Barone, Boyle and Vanderwyde. (43:41, 45). They were all very positive about Wagner's promotion, telling him to "be on the lookout to be a help to the union" and to "make a dollar wherever . . . [he] could." (43:47).

As soon as Wagner became manager, he began making monthly payments of \$800 to Boyle on behalf of MTI. (43:56). He continued making such payments through 1971. (43:60). In a discussion that occurred late in 1970 at the MTI warehouse, Boyle told Wagner that the money was going into a "pot," and that Boyle's position would improve because he would "share in the entire pot." (43:68-70). Shortly after that discussion, Wagner increased the payments to \$1,000 per month. (43:72). Wagner testified that he also paid Boyle from \$4,000 to \$8,000 in each of the years 1972, 1973 and 1974 over and above the \$1,000 monthly payments. (43:77).

During this same period, Wagner was making cash payoffs to appellant Cleveland Turner in amounts ranging from \$5,000 to \$7,000 each year. In 1972, however, Wagner was experiencing problems generating enough cash to pay Turner so they arranged for Wagner to put ghost employees on MTI's payroll, that is, persons who did not actually work for MTI. Wagner would then turn the payroll checks of such persons over to Turner. (43:85-89).

In mid-1972, Wagner met with Julio Navarro, who worked for a container/trailer repair company operating at the port of Miami. Navarro wanted Wagner to explore the possibility of allowing appellants Raymond Kopituk and Oscar Morales, friends of Navarro's, to open a container/trailer repair business on Dodge Island. (43:119). Wagner said he would entertain the idea and arranged to meet with them.

Prior to meeting with Kopituk¹¹ and Morales, Wagner discussed the matter with Barone, in the presence of Boyle and Vanderwyde. (43:120). Wagner suggested that he would tell Kopituk and Morales that a union contract on Dodge Island would cost them \$10,000 up front and \$1,000 per month thereafter. (43:120). Barone said that would be acceptable. (43:121). When Wagner met with Kopituk and Morales, however, he told them it would cost \$15,000 up front, rather than the \$10,000 he had discussed with Barone. They readily agreed. (43:122).

Approximately four weeks later, Wagner met with Kopituk and Morales at a Howard Johnson's where they delivered the \$15,000 in cash. Wagner kept \$2,500, gave Julio Navarro \$2,500 and gave the remaining \$10,000 to Barone. (43:126-131). Shortly thereafter, MTI began sending business to Florida Welding Services Corp. ("FWS"), the company operated by Kopituk and Morales. (43:135). In order to allow FWS to recoup some of the initial payoff money, Wagner prepared inflated invoices on behalf of FWS that were paid by MTI. (43:124, 138, 151-152). He terminated this arrangement after FWS began receiving a substantial amount of waterfront business. (43:154).

Wagner collected the \$1,000 monthly payments from FWS and delivered them to Boyle, Vanderwyde or Barone. (43:155-156). He testified that on two occasions he received the payment from appellant Dorothy Kopituk, wife of appellant Raymond Kopituk. (43:170; 44:22-24). On one such occasion, Mr. Kopituk explained

¹¹ For purposes of convenience, we will usually refer to Raymond Kopituk simply as "Kopituk" and to appellant Dorothy Kopituk either by her full name, as "D. Kopituk," or as "Mrs. Kopituk."

to Wagner that they were having trouble generating cash and asked if he would accept a check. Wagner said he would and Mrs. Kopituk asked him how she should record the check. Wagner told her he did not care and that as far as he was concerned she could write down "Happy Birthday." She asked him if "consulting fee" would be acceptable and he answered affirmatively. (44:23). She proceeded to record the check in that manner.

In the summer of 1973, Morales approached Wagner concerning a friend of his who wished to begin a trucking operation at Dodge Island Seaport. He asked if Wagner could do the same for him as he had done for FWS. Wagner agreed to try. (44:41). Wagner discussed the proposal with Barone, in the presence of Boyle and Vanderwyde, and Barone gave his approval. The trucking company, Jasca Transfer, Inc., was to pay the union \$10,000 up front. (44:43). As he had done with FWS, however, Wagner told Jeronimo Acosta, the owner of Jasca Transfer, that the initial payoff would be \$15,000. (44:47). In turn, Wagner agreed to split the extra \$5,000 with Morales. (44:45). The deal was transacted as planned and, shortly thereafter, MTI began sending trucking work to Jasca Transfer.

Co-defendant Joseph Cotrone came to Miami from New York in 1972. Along with his father and sister Laura (also co-defendants), he established United Container and Ship Repair, Inc., a company that performed container, trailer and minor ship repairs. In early 1974, Barone and Boyle visited Cotrone's office and Barone told Cotrone that he should pay Barone \$200 per month "to make everything move smoothly," i.e., for union peace. (59:196). Barone told Cotrone that the other

trailer and container repair companies operating at the port had already agreed to such an arrangement. Barone stressed the fact that he had close connections with the steamship lines, with which companies such as Cotrone's did a substantial amount of business, and that it would mean trouble for him if he declined to go along. (59:196-197).

After discussing Barone's proposal with his father, Cotrone agreed to make the payments. (59:197). The payments were made to Barone in cash, using \$20 bills at Barone's request. (59:198). After the initial payments were made, the means of generating sufficient amounts of cash to make the payments was left to co-defendant Francesca Cotrone, another of Joseph Cotrone's sisters, who began working for the company in 1975. (59:205).

In September 1975, Barone informed Cotrone that he wanted to alter the payoff schedule by charging Cotrone 25 cents for every hour worked by each of his employees. (59:203). Once again, Barone told Cotrone that his competitors had already agreed to the increase, that Barone's relationship to the steamship lines was very strong and that it would be "wise" for Cotrone to acquiesce. (59:203).

Cotrone discussed the demand with his family and it was agreed that they would make the payments. (59:205). This new method of calculating the payoffs owed to Barone dramatically increased the amount of the monthly payments. Cotrone testified that he began paying Barone from \$1,000 to \$1,500 each month. (59:207). The payments continued until December 1975. (59:212).

Cotrone's company, United Container and Ship Repair, Inc., had the contract to perform container and

trailer repair work for PRMMI, the Puerto Rican steamship line. In 1975, representatives of PRMMI offered Cotrone's company a contract to perform their maintenance and repair work at the port of Jacksonville, Florida. (60:35-36). Cotrone discussed the possibility with Barone and Boyle. Barone said Cotrone would have to pay \$3,000 to appellant Landon Williams in order to get an introduction into the Jacksonville area. (60:42).

Cotrone subsequently gave Barone the \$3,000 and in June 1975 Barone took Cotrone to Jacksonville to meet Williams. (60:52). Shortly after they sat down to discuss the labor situation in Jacksonville, Williams told Cotrone: "Jacksonville is like Egypt and I'm the Pharaoh in Egypt; and anything that's done up here must come through the Pharaoh." (60:53).

The Cotrones formed a new company, United Trailer Services, Inc., to operate in Jacksonville and hired Robert Gillespie and Stephen Miller to manage it. (60:55). Shortly after Cotrone's Jacksonville company began functioning, Barone told Cotrone that he expected peace payments amounting to 25 cents for every hour worked by each of Cotrone's Jacksonville employees. (60:64-65). Cotrone discussed the matter with his father who concluded that the situation was "getting ridiculous" and that they were not going to pay Barone anything for the Jacksonville operation until they spoke with Landon Williams. (60:66).

On October 3, 1975, Cotrone travelled to Jacksonville to meet with Williams. Upon learning of Barone's request for payment, Williams said: "There's no way anything like that is going to happen in my port. If anybody is going to receive any money, it's going to be me." (60:73). Accordingly, Williams and Cotrone arrived at an agreement whereby Williams would be paid 25 cents

for each man-hour worked in Jacksonville. (60:74). Thereafter, Miller and Gillespie, at Cotrone's direction, made regular payments to Williams, although in 1975 the 25 cents-per-hour formula was abandoned in favor of a flat \$1,000 per month. (63:26-27, 39-45; 64:141, 172-203).

Great Southern Trailer Corp. was a container and trailer repair business operating in Savannah, Georgia, during the period covered by the indictment. It was jointly owned by Ramon DeMott and James Hodges. In the summer of 1975, DeMott and Hodges learned that the container repair work at the port of Savannah was going to be unionized and that it would therefore be necessary for them to obtain a union contract in order to stay in business. (11:28; 13:40).

DeMott sought advice from appellant Morales, whom he had met a year earlier in a business context, because he knew Morales was operating under a union contract. (11:39-40). DeMott and Hodges subsequently met with Morales and appellant Kopituk at Great Southern's Savannah office to discuss how to go about acquiring a union contract. (11:42-43). Morales told them it would cost money, anywhere from \$5,000 to \$15,000. (11:44; 13:48). Kopituk agreed with Morales' estimate. (11:45; 13:48).

Shortly after Morales and Kopituk departed, DeMott and Hodges received a telephone call from appellant Boyle, who said that he wanted to meet with them at his Savannah office. (11:46; 13:48-49). When they arrived, Kopituk was sitting inside Boyle's office and Morales was outside on the veranda talking with Boyle. (11:46; 13:50). After Morales and Kopituk left, Boyle told DeMott and Hodges that it would cost them \$10,000 to obtain a union contract in Savannah. (11:49; 13:52).

They complained that they did not have that much money and Boyle told them they could pay \$6,000 initially and \$4,000 at a later date. (11:50; 13:52). DeMott and Hodges subsequently borrowed \$6,000 which they gave to Boyle on their way to the ILA office in Savannah to sign the union contract. (11:50-63; 13:52-62).

Present at the contract "negotiation" meeting were appellant Williams, appellant Boyle, co-defendant Jackson, DeMott and Hodges. DeMott and Hodges attempted to negotiate certain changes in the terms of the contract, but Williams told them: "Well, this agreement that's there is going to be it and you are going to sign the fucking contract or get out of the damn business." (11:71-72). When DeMott and Hodges persisted in attempting to discuss the content of the agreement, Williams told them that "people who had gained disfavor wound up on their backs in bed and their arms and legs in traction, sipping soup through a straw and thinking about the follies of their ways." (11:72). DeMott and Hodges signed the contract. (11:73).

While DeMott and Hodges were driving Boyle back to his office, Boyle explained to them that they would have to pay him 30 cents for every hour worked by each of their employees. (11:134). Boyle said that the money was not just for him, but for his associates as well. (11:134). DeMott and Hodges thereafter made regular payments to Boyle calculated on the basis of the 30 cents-per-hour formula. (11:85-86, 94-98, 114-121, 156-162, 198-204; 13:81, 87-88, 90, 106-111, 153-154).

Toward the end of 1975, Boyle suggested that DeMott and Hodges expand their container repair business into Charleston, South Carolina. (11:82). He said this could

be accomplished for \$5,000. (11:83). DeMott and Hodges agreed to establish a Charleston operation and, in February 1976, paid Boyle \$5,000. (11:85, 117). Business, however, did not go well in Charleston and the operation lasted only about six months. (11:137). About the time they were dismantling their business in Charleston, DeMott and Hodges had dinner with appellant Field in Savannah. Hodges complained to Field that they were never given the opportunity to submit bids in Charleston, to which Field replied, "Don't expect anything for nothing." (11:143).

Harrington & Company is a steamship agent and stevedoring company that operates at the Dodge Island Seaport in Miami. Dorothy T. Howard, secretary-treasurer of the company, testified that in 1972, at the direction of co-defendant Neal L. Harrington, she began preparing and cashing monthly checks in amounts of several hundred dollars, which she charged to the company loan account of either Harrington or Royal O. White (the co-owners of Harrington & Company). (17:24, 26-27, 33). She would place the cash in an envelope and give it to Harrington. (17:32). Preparation of these checks coincided with visits from appellant Boyle. (17:35-36).

Eventually, Howard herself, through an implicit understanding with Harrington, developed the "habit" of giving envelopes containing varying amounts of cash to Boyle on a monthly basis. (17:37). On each occasion, she charged the amounts to the personal loan account of either Harrington or White. In March 1974, the same practice was commenced with respect to appellant Turner. (17:46-49). The amounts contained in the envelopes ranged from \$400 to \$1,380 for Boyle and

\$200 to \$800 for Turner. (17:53-59). White, Harrington's business partner, testified that Harrington told him the payments were for the purpose of ensuring labor peace and were necessary in order to stay in business. (18:13, 20, 25).

Coordinated Caribbean Transport, Inc. ("CCT") is a transportation company that has its headquarters at the port of Miami. The company is involved in transferring cargo received at the port from overland carriers to trailers that are then loaded onto ships destined for foreign ports. (18:132-133). During the period covered by the indictment, the company had contracts with the Miami longshoremen's union (ILA Local 1416) and the checkers' union (ILA Local 1922). (18:134-135).

Boyle served as liaison between CCT and the longshoremen's and checkers' unions, respectively. (18:148-149). In 1974, CCT was trying to improve its warehousing operations through negotiations with the unions. Hector C. Calderon, a vice-president for CCT, testified that Boyle approached him early in 1974 and suggested that labor conditions at the warehouse could be improved for "certain considerations." (18:150). Calderon ignored the statement, but Boyle broached the subject again at a subsequent meeting. (18:151-152).

Boyle suggested that if CCT began paying him \$1,000 per month, labor conditions at CCT's warehouse would improve. (18:152). After discussing the matter with a senior official of CCT's parent company, Calderon informed Boyle that he had received authorization to make the payments. (18:157-158). Boyle and Calderon ultimately agreed that CCT would pay Boyle \$600 per month. (18:159). In late 1975, however, officers of CCT decided to terminate the payments to Boyle.

(18:166). Shortly thereafter, Calderon informed Boyle of CCT's decision to terminate the arrangement, while making one last payment of \$3,600 (intended to represent six future monthly payments). (18:167-168).

George Krickovich was employed by Eller & Company, a Miami-based stevedoring operation, throughout the period covered by the indictment. Krickovich testified that in early 1973, a 155-ton crane owned and operated by Eller & Company was idled until he agreed to pay George Wagner \$50 per month. (51:192). Wagner told Krickovich that other cranes on Dodge Island were operating only because the companies that owned them were "taking care of some stevedores." (51:191).

In 1976, Krickovich asked appellant Boyle about the possibility of Eller & Company obtaining a contract to perform stevedoring work for a shipping company that operated between the United States and Puerto Rico. (51:194). Boyle responded that no contract for the work had yet been awarded and that Eller & Company could receive favorable treatment if four or five ghost employees were placed on the company's payroll. (51:194). Krickovich asked what work the employees would be performing and Boyle said, "Nothing." (51:195). Boyle told Krickovich that the employees would have to be paid in cash. (51:195). Krickovich discussed the matter with a senior official of Eller & Company who rejected the arrangement. (51:196).

In January 1977, the covert portion of the investigation terminated with the issuance of numerous grand jury subpoenas. The indictment was returned in June 1978 and the case went to trial in January 1979. In September 1979, the jury returned guilty verdicts as to all nine appellants herein.

All of the appellants except Dorothy Kopituk were found guilty of the substantive and conspiracy charges (Counts 1 and 2) brought under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.* Additional charges upon which appellants were found guilty included:

Barone—extortion (Count 3), 18 U.S.C. § 1951, 18 U.S.C. § 2; substantive Taft-Hartley Act violations (Counts 4, 6, 7, 11, 12, 13, 19, 25, 27, 31, 43 and 48), 29 U.S.C. § 186, 18 U.S.C. § 2; filing of false income tax returns (Counts 58, 59, 60, 61 and 62), 26 U.S.C. § 7206(1).

Boyle—extortion (Count 3), 18 U.S.C. § 1951, 18 U.S.C. § 2; substantive Taft-Hartley Act violations (Counts 4, 5, 6, 7, 8, 9, 11, 13, 16, 17, 19, 20, 22, 24, 27, 32, 35, 39, 41, 43, 46, 47 and 52), 29 U.S.C. § 186, 18 U.S.C. § 2; receipt of illegal kickbacks (Counts 21 and 23), 18 U.S.C. § 1954; obstruction of justice (Count 33), 18 U.S.C. § 1503; filing of false income tax returns (Counts 63, 64, 65, 66 and 67), 26 U.S.C. § 7206(1).

Field—substantive Taft-Hartley Act violations (Counts 17 and 24), 29 U.S.C. § 186, 18 U.S.C. § 2.

Turner—substantive Taft-Hartley Act violations (Counts 5, 10, 14 and 18), 29 U.S.C. § 186, 18 U.S.C. § 2.

Vanderwyde—extortion (Count 3), 18 U.S.C. § 1951, 18 U.S.C. § 2; substantive Taft-Hartley Act violations (Counts 4, 8, 16, 27 and 43), 29 U.S.C. § 186, 18 U.S.C. § 2.

Williams—substantive Taft-Hartley Act violations (Counts 44 and 46), 29 U.S.C. § 186, 18 U.S.C. § 2; filing of false income tax returns (Counts 68 and 70), 26 U.S.C. § 7206(1).

R. Kopituk—substantive Taft-Hartley Act violation (Count 44), 29 U.S.C. § 186, 18 U.S.C. § 2; filing of false income tax returns (Counts 68 and 70), 26 U.S.C. § 7206(1).

D. Kopituk—substantive Taft-Hartley Act violation (Count 44), 29 U.S.C. § 186, 18 U.S.C. § 2; filing of false income tax returns (Counts 68 and 69), 26 U.S.C. § 7206(2).

A. Substitution of Alternate Juror

The central issue raised in this appeal is whether the district court erred in substituting an alternate juror for a disabled regular juror after the jury had begun deliberating.

At approximately 1:00 P.M. on Saturday, August 11, 1979, the jury retired to begin its deliberations. (99:144). The judge ordered that the two remaining alternate jurors be sequestered and directed a deputy United States marshal to escort them back to the hotel. (99:144-145). The trial judge instructed the alternate jurors not to discuss the case with anyone, telling the alternates that “[t]here is still a possibility that you may have to serve.” (99:146). The judge subsequently arranged to have the alternates sequestered on a floor of the hotel separate from that of the regular jurors. (99:156-157). The jurors deliberated only two-and-one-half hours on this first day. The trial judge excused them at 3:30 P.M. to allow them to tend to their personal needs. (99:172).

The jury resumed the deliberations on Monday, August 13. On Wednesday, August 15, the trial judge released the two alternates from their sequestration and sent them home. In so doing, the trial judge specifically told the alternates that they were “discharged.”

(102:22-23). Nevertheless, he proceeded to instruct them to avoid all newspaper and television coverage of the trial "in the slim possibility that we might still call you." (102:23). He further instructed them not to discuss the case with anyone and not to leave the state until the case was concluded. (102:23-24).

On Friday afternoon, August 17, the court received a note from the foreperson of the jury expressing concern as to the mental condition of one of the jurors. (104:4). The foreperson requested that the jury be permitted to adjourn until Monday, promising that she would monitor the condition of the ill juror during the weekend. (104:4). The trial judge granted the request and deliberations were suspended until Monday, August 20. (104:6). On Monday morning, the foreperson sent the court another note stating that, in her opinion, the juror about whom she had previously expressed concern required professional help. (104:6). Shortly thereafter, the court received yet another note from the foreperson stating that the jury would be unable to continue deliberating until some action was taken with respect to the troubled juror. (104:7).

A hearing was held that afternoon at which the court, together with counsel, explored the juror's condition. It became readily apparent that the juror was mentally ill. The deputy marshal responsible for guarding the jury room related to the court that the juror stated that the Lord was talking to her, that Lucifer was after her and, at one point, that she was Moses. (104:8). The foreperson of the jury told the court and counsel that the juror had been hallucinating (104:46) and that she was extremely unstable, repeatedly alternating between states of elation and depression. (104:46, 50). The ill juror had told the other jurors of a revelation she

experienced the night of August 16 in which she realized she was a genius with an IQ of 200 and that her position as a juror in this case was part of a divine mission. (104:33, 68-69).

On Tuesday, August 21, the court arranged for the juror to be examined by a psychiatrist, who concluded that she was mentally disabled and unfit to continue in her capacity as a juror in this case.¹² Following extensive discussion with counsel, the trial judge, without objection, ordered that the incapacitated juror be discharged. (105:25). When defense counsel objected to proceeding with an 11-person jury, the court adjourned for the remainder of the day to consider whether or not the first alternate juror should be recalled. (105:27-28).¹³

The following day, the court, over the objections of defense counsel, decided to substitute the first alternate juror, Mrs. Evangelist, for the disabled juror. (106:45). Before doing so, however, the trial judge extensively questioned Mrs. Evangelist as to her continued fitness to serve as a juror. Mrs. Evangelist testified that, in

¹² In an *in camera* proceeding, the psychiatrist told the court and counsel that "the sooner [the ill juror] is removed from the situation the better. As I said, I don't believe that she is capable of functioning as a juror, so it would also be in terms of the best interests of the legal process." Vol. 3, Supp. Record on Appeal, at 9. The psychiatrist testified that she was experiencing "a manic episode, with marked grandiosity, marked religiosity, and is by every definition psychotic." *Id.* at 7.

¹³ Throughout the period that the court and counsel were wrestling with the problem of the disabled juror, the other 11 regular jurors were kept sequestered in their hotel, having been ordered not to discuss the case further until the matter was resolved. (105:3). All of their notes, verdict sheets and the indictment were collected by the deputy marshal and placed under seal. (105:30-31; 106:63-64).

accordance with the court's instructions, she had not discussed the case with anyone, she had not received any information about the case through the media or any other extrinsic source and that she felt she was capable of rendering a fair and impartial judgment with respect to all defendants. (106:55-58).

After questioning the alternate juror, the court proceeded to examine each of the remaining 11 regular jurors individually regarding their respective abilities to begin deliberating anew. (106:73-141). Each juror stated that he or she would be able to disregard any opinions or conclusions previously expressed during deliberations and start all over again. While some jurors expressed reservations about having to commence their deliberations anew, such reservations were attributable to their understandable desire to be reunited with their families rather than to any obstacle relating to their thought processes. (106:73-141).

Accordingly, on Thursday, August 23, the alternate juror was seated with the 11 original regular jurors and the court reinstructed them in full. (107:36-106). As part of the instructions, the court repeatedly emphasized that the jurors were duty-bound to begin their deliberations afresh, disregarding all of their previous deliberations. (107:36-39, 105-106).¹⁴ The jury then

¹⁴ The following excerpt demonstrates the extraordinary extent to which the trial court stressed, even belabored, this point at the commencement of the instructions:

As you will recall, yesterday I asked you whether you would be able to start your deliberations anew and put out of your mind all deliberations you have engaged in since August 11.

I want to remind you now that each of you stated you could do so, and I now instruct you that you must do so.

retired and deliberated for just over one week before returning its verdict on September 1, 1979.

You must each put out of your minds all the deliberations that you have engaged in thus far. You must consider the evidence in this case anew just as you did when you first retired to deliberate this case.

You must each determine to start anew your consideration of each count and each defendant. You must not let anything that has happened in the course of the period you have spent in deliberation in any way affect the course of your new deliberation.

You are to start fresh as if the past days have simply not happened. Each of you must keep in mind your pledge that you can begin your deliberations with a completely open mind. On each shoe [sic] you must decide and you must abide by that pledge throughout your deliberations.

In order to help you start fresh in your thinking about this case, I am going to reinstruct you on the law, just as I instructed you on August 11.

I want each of you, as you listen to the instructions, to consider only the evidence you have heard at this trial and not in any way consider the deliberations you have engaged in during the past twelve days or any conclusions, tentative or final, that any of you may have reached in the course of your deliberations.

The reason for this requirement is that the law grants to the prosecution and to each defendant the right to a unanimous verdict, reached only after full participation of the twelve jurors who ultimately return verdicts.

That right can only be assured if the twelve of you who now make up this jury begin today as if no prior deliberations had ever occurred.

The verdict of the jury cannot be unanimous unless each and every one of you reaches the decision through deliberations which are the common experience of all of you. Each member of your group must have the benefit of the opinions and deliberations of the other eleven, and each of you must heed the personal reactions and interreactions of your fellow jurors, including your new member.

[footnote continued]

Resolution of this issue, that is, whether the trial court erred in substituting an alternate juror for a disabled regular juror after deliberations had begun, is controlled by a recent decision of the United States Court of Appeals for the Fifth Circuit, *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S. Ct. 2965, 73 L. Ed. 2d 1354 (1982),¹⁵ wherein it was held that such a procedure constitutes reversible error only if the defendants are prejudiced by the substitution. In *Phillips*, the panel found that the procedural safeguards taken by the trial judge (which were expressly patterned after those employed by the trial judge in the instant case) operated to obviate any danger of unfair prejudice. 664 F.2d at 993.

I emphasize this point because it is essential under the law that you deliberate together, among yourselves and without regard to what may have occurred earlier.

Although this requirement that you start deliberations anew may impose and undoubtedly does impose some hardship upon you in terms of the time spent re-reviewing the evidence of the trial, I am confident that each one of you will follow this necessary procedure.

I want to thank you for and commend you for your patience and your understanding. We have been in trial many months. The unfortunate events of this past week are the fault of no one, as I am sure you all understand. It is to solve that problem that we are proceeding the way that we are presently proceeding.

I was certainly, as I am sure all counsel were, impressed with your willingness to do that which you have agreed to do under these difficult circumstances and, that is, to begin your deliberations anew.

(107:36-39).

¹⁵ The *Phillips* decision was entered after the briefs had been submitted in the case at bar, but prior to oral argument.

The decision in *Phillips* is binding as precedent in this circuit pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981). Extrapolating from that fact, it is clear that this panel is bound by the *Phillips* decision because one panel of the court of appeals is not permitted to overrule or reconsider the decision of a prior panel. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 877 (5th Cir. 1981); *United States v. Alfrey*, 620 F.2d 551, 555 (5th Cir. 1980).

The facts in *Phillips* were remarkably similar to those in the instant case. Indeed, *Phillips* approaches the status of the proverbial "red cow" case with respect to the substituted juror question raised herein. *Phillips*, like the case at bar, was a massive, complex RICO case. The trial involved several defendants and lasted more than five months. After the jury had been deliberating for approximately two days, one of the regular jurors became ill and subsequently suffered a heart attack. The district court decided to replace the disabled regular juror with an alternate juror who had been kept separately sequestered. In so doing, the court expressly relied upon the procedures employed by the district court in the instant case, the trial of which had concluded six months earlier. 664 F.2d at 991 n.13.

In accordance with those procedures, the trial judge in *Phillips* questioned the alternate juror as to whether he had discussed the case with anyone or whether he had been exposed to any extrinsic information concerning it and questioned each of the remaining regular jurors as to whether they would be able to begin their deliberations anew. He also ordered that all notes and other handwritten material compiled by the jurors during

deliberations be confiscated. Finally, he reinstated the jury in full, particularly emphasizing their duty to commence their deliberations with a clean slate. 664 F.2d at 991.

In *Phillips*, the appellate court was faced with challenges that mirror those raised herein, i.e., that substitution of an alternate juror after the jury has commenced its deliberations violates the clear provisions of *Fed. R. Crim. P.* 24(c), the right to trial by a fair and impartial jury guaranteed by the Sixth Amendment, and the prohibition against being placed in double jeopardy incorporated within the Fifth Amendment.

Turning first to the constitutional arguments, the *Phillips* panel found no *per se* constitutional impediment to substitution of an alternate after deliberations have begun where good cause has been shown for the substitution and where adequate safeguards, such as instructing the reconstituted jury that they must begin deliberating anew, have been taken. 664 F.2d at 992-993. In so finding, the court relied in part upon *People v. Collins*, 17 Cal. 3d 687, 552 P.2d 742, 131 Cal. Rptr. 782 (1976), *cert. denied*, 429 U.S. 1077, 97 S. Ct. 820, 50 L. Ed. 2d 796 (1977), wherein the California Supreme Court held that substitution of an alternate juror after jury deliberations have begun is permissible under the California constitution. The California court determined that so long as "a properly qualified alternate juror is available and the juror fully participates in all of the deliberations which lead to a verdict," the right to jury trial is not violated. 131 Cal. Rptr. at 786, 552 P.2d at 746. The *Phillips* panel found such reasoning to be equally applicable to the Federal Constitution and, therefore, dispositive of appellants' Sixth Amendment argument.

The appellants in *Phillips* also claimed, as do the appellants herein, that substitution of the alternate juror operated to place them twice in jeopardy for the same offense in violation of the Fifth Amendment. That argument was rejected offhandedly, the court concluding that:

[c]onsideration of defendant's case by a jury which includes a former alternate who has replaced a regular juror after deliberations have begun no more violates the double jeopardy clause than does consideration by a jury which includes a former alternate who has replaced a regular juror during the trial before jury deliberations have begun.

664 F.2d at 991-992 n.14.

Finally, with regard to appellants' most pressing argument, i.e., that substitution of the alternate juror mandated declaration of a mistrial because such a procedure is contrary to the express language of *Fed. R. Crim. P.* 24(c), the *Phillips* court commenced its analysis with a determination that Rule 24(c) is not constitutionally grounded. 664 F.2d at 992.

Rule 24(c) reads in pertinent part as follows:

Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

While recognizing that substitution of the alternate juror constituted a violation of Rule 24(c), the court declined to adopt a position that would require automatic reversal in all cases in which the rule was violated. Rather, the appropriate inquiry, according to the court, is whether

the defendants were prejudiced by the substitution. 664 F.2d at 993. In *Phillips*, the court found that the precautions employed by the trial judge sufficed to obviate any danger of prejudice to the appellants, stating:

The safeguards utilized by the court neutralized the possible prejudice to the appellants. We need not remand for an evidentiary hearing on the issue of prejudice, [citing case], because we conclude that the instructions to the jury to begin anew, the jurors' individual assurances that they could in fact begin anew, and the full participation of the substituted alternate in the deliberations, which lasted six days, obviated the danger of undue prejudice. On the record before us we cannot discern that appellants were prejudiced by the substitution. The substitution procedure utilized by the court did not deprive appellants of their right to a full consideration of the cases by an impartial jury panel.

664 F.2d at 996.

Having the benefit of Judge Johnson's opinion in *Phillips*, further discussion of appellants' legal arguments relative to the substituted juror question would be superfluous. Each of those arguments has been effectively disposed of as a matter of legal principle. All that remains is to apply *Phillips* to the facts at bar.

It is of no small significance that the safeguards approved in *Phillips* were formulated in express reliance upon the district court's opinion previously entered in the instant case. See *United States v. Barone*, 83 F.R.D. 565 (S.D. Fla. 1979). As in *Phillips*, the trial judge in the instant case extensively questioned the alternate juror as to whether her continued fitness to serve had been tainted by any extrinsic influence. As in *Phillips*, the trial judge questioned each remaining regular juror individually and received assurances from all jurors that they

would commence their deliberations anew. As in *Phillips*, the trial judge confiscated all notes and handwritten material compiled by the jurors during their original deliberations. Finally, as in *Phillips*, the trial judge reinstated the jurors in full, emphasizing their duty to disregard all prior deliberations and begin afresh.

In *Phillips*, the panel noted that the jury deliberated on its verdict for six days following substitution of the alternate juror. 664 F.2d at 991, 996. Similarly, in the instant case, the jury deliberated for more than a week following substitution of the alternate. This is significant because one of the primary concerns of permitting an alternate juror to be substituted after jury deliberations have commenced is that the 11 original regular jurors may have already made up their minds to convict and, together, may coerce the alternate juror into joining in their position. See *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975).¹⁶ The fact that the jury continued to deliberate for an entire week after the alternate was substituted negates any inference that the original regular jurors had previously decided to convict and that they impressed that position on the alternate.

¹⁶ In *Lamb*, contrary to the instant case, the circumstances indicated a strong likelihood that the 11 original jurors coerced the substituted alternate juror into voting to convict. Prior to substitution of the alternate, the original jury had returned a guilty verdict after deliberating for four hours. The trial judge refused to accept the verdict, believing that it was reached in a manner contrary to his instructions. He declared a luncheon recess, after which one of the jurors requested to be excused, stating that she was "emotionally unable to come to a decision." The judge excused the regular juror and substituted an alternate juror, instructing the jury that they had to begin their deliberations anew. Nevertheless, despite the court's instructions, the reconstituted jury returned a guilty verdict only 29 minutes after it retired to deliberate. 529 F.2d at 1155.

Notwithstanding the many similarities between the instant case and the *Phillips* case, however, some factual distinctions do exist. In *Phillips*, the alternate juror was kept separately sequestered up until the moment he was substituted. In the instant case, although the trial judge initially decided to keep the alternates separately sequestered, he released them from their sequestration after four days. Upon doing so, however, he instructed them not to discuss the case with anyone and to avoid all media coverage of the trial because there was a possibility that they would be recalled. Moreover, prior to seating the alternate as a regular juror, the judge made an extensive inquiry to satisfy himself and counsel that the alternate had indeed obeyed his instructions. Consequently, the fact that the alternate juror was physically sequestered for only a portion of the time prior to being substituted is not, in light of the other precautions taken by the trial court, a distinguishing fact of such significance as to command a different result.

Another factual distinction between this case and *Phillips* concerns the period of time the jury spent deliberating prior to substitution of the alternate juror. As noted *supra*, in *Phillips*, the jury deliberated for approximately two days before the regular juror became incapacitated and the alternate was substituted. In the instant case, the jury spent a total of approximately five days deliberating prior to substitution of the alternate.¹⁷

¹⁷ While there was a gap of 12 days between the day the jury first began deliberating and the day the alternate juror was actually seated as a regular juror, a review of the events that transpired shows that actual deliberations occupied less than five of those days. The jury retired to deliberate at 1:00 P.M. on Saturday, August 11, and was excused two and one-half hours later. Since they had to elect a foreperson and did not even receive the evi-

[footnote continued]

Admittedly, the further along deliberations proceed, the more difficult it becomes to disregard them and begin anew. Nevertheless, the jurors' individual assurances that they could and would begin deliberating anew, combined with the fact that the jury deliberated for a full week subsequent to substitution of the alternate juror, is sufficient indication that the jurors were able to and did in fact obey the court's extensive instructions regarding their duty to eliminate all prior deliberations from their minds and begin with a clean slate.

Finally, the facts of this case are distinguishable from those in *Phillips* in that the trial judge, upon releasing the alternate jurors from their sequestration, specifically stated that they were "discharged," whereas, it is argued, no such statement was ever made in the *Phillips* case. Appellants focused on this point during oral argument, although no attempt was made to explain why such a distinction should be determinative.¹⁸ Although the

dental exhibits until the following week, it is unlikely that any serious deliberations occurred on that first day. Deliberations were resumed on Monday, August 13, and continued until Friday afternoon, August 17, when deliberations were suspended following receipt of the first note concerning the mentally ill juror. Although deliberations purportedly resumed on Monday, August 20, at 9:00 A.M., it was only 9:45 when the court received the second note from the foreperson suggesting that the ill juror needed professional help. Shortly thereafter, the court received a third note stating that jury deliberations could proceed no further until some action was taken with respect to the ill juror. The following morning the court expressly instructed the jury to cease all further deliberations until the problem of the disabled juror was resolved. Thus, although there was a 12-day period between the day the jury first retired to deliberate and the day the alternate juror was substituted, it appears that actual deliberations occurred only from Monday, August 20, through Friday, August 24.

¹⁸ As the government points out in its brief, since the trial court expressly "discharged" the alternate jurors, it could be argued that

trial judge used the word "discharged" in sending the alternate jurors home, he made it clear to them that their duties as jurors had not necessarily terminated. In fact, he expressly told them that there was still a possibility that they would be recalled and instructed them not to discuss the case with anyone, to avoid all media coverage of the case and to remain within the state of Florida.

The tenor of appellants' argument suggests that it would have been acceptable for the trial judge to have said, "Go home, I release you," or use any other combination of words of similar import, so long as he did not use the word "discharge." We decline to attribute any such talismanic quality to that word and accordingly reject appellants' argument on this point.

Our decision that substitution of the alternate juror after deliberations had begun does not constitute reversible error should not be misconstrued as a stamp of approval upon such a practice. As was true in *Phillips*, the trial court's decision to substitute the alternate was made in the context of a trial of truly epic proportions in terms of length, scope and expense to both sides. We endorse the statement in *Phillips* that, "Our conclusion that the district court committed no reversible error must likewise be understood as limited to such an exceptional context." 664 F.2d at 996.

It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is "the rule" and the substituted juror

Rule 24(c) was not even violated. The rule simply states that the alternate "shall be discharged after the jury retires to consider its verdict." It says nothing about whether the alternate jurors can be recalled. While the government attorneys deserve credit for their ingenuity, we reject this argument and assume that Rule 24(c) was violated when the alternate juror was recalled.

procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only when extraordinary precautions are taken, as was done below, to ensure that the defendants are not prejudiced.

B. Severance Issues

Appellants raise a variety of claims that focus upon the failure of the district court to grant any of their several motions to sever certain offenses and/or defendants from the trial below. Their arguments, while somewhat convoluted, state claims of misjoinder under *Fed. R. Crim. P.* 8 and improper denial of relief from prejudicial joinder under *Fed. R. Crim. P.* 14.

(1) *Misjoinder*

Appellants Vanderwyde, Williams, Morales and the Kopitukas contend that the counts of the indictment charging income tax offenses (Counts 58 through 70) were improperly joined with the counts charging non-tax offenses. A substantial portion of appellants' argument on this issue, however, is erroneously premised upon *Fed. R. Crim. P.* 8(a), which deals with joinder of offenses. It is well established that Rule 8(a) applies only in cases involving a single defendant charged with multiple offenses, whereas Rule 8(b) governs in cases involving multiple defendants.¹⁹ *United States v. Levine*,

¹⁹ Rule 8 reads as follows:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on

546 F.2d 658, 661 (5th Cir. 1977); *United States v. Park*, 531 F.2d 754, 760 n.4 (5th Cir. 1976); *United States v. Maronneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975); *United States v. Gentile*, 495 F.2d 626, 628 n.2 (5th Cir. 1974); *United States v. Bova*, 493 F.2d 33, 35 (5th Cir. 1974); *Cupo v. United States*, 359 F.2d 990, 992 (D.C. Cir. 1966), cert. denied, 385 U.S. 1013, 87 S. Ct. 723, 17 L. Ed. 2d 549 (1967); *King v. United States*, 355 F.2d 700, 704-705 (1st Cir. 1966). See generally 1 C. Wright, *Federal Practice and Procedure* § 143, § 144 (1969). But see *United States v. Diaz-Munoz*, 632 F.2d 1330, 1335-1336 (5th Cir. 1980).

Nevertheless, while it is clear that appellants' reliance upon Rule 8(a) is misplaced, this does not destroy their underlying argument on appeal, for the analysis under either subsection is, with one exception, more or less the same.²⁰ The critical difference between the two subsections is that Rule 8(a) allows joinder of offenses against a single defendant that "are of the same or similar character," even if such offenses do not arise out of the same series of acts or transactions. Under Rule 8(b), offenses may not be joined unless they arise out of a

two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

²⁰ In *United States v. Maronneaux*, *supra*, it was held that, because there has been some misapplication of subsection (a) to cases involving multiple defendants, improper reliance upon that subsection, rather than subsection (b), is not fatal to a defendant's cause on appeal. 514 F.2d at 1249.

series of acts or transactions, regardless of how similar they may be in character. 1 C. Wright, *Federal Practice and Procedure* § 144 (1969). That distinction, however, does not bear on the resolution of this appeal.

The substance of appellants' argument that it was improper to join the counts charging tax offenses with the counts charging other types of offenses is derived largely from *United States v. Diaz-Munoz*, *supra*, in which a panel of the former Fifth Circuit Court of Appeals reversed the convictions of three defendants on the ground that, *inter alia*, counts of the indictment charging various income tax offenses were improperly joined with counts charging embezzlement and insurance fraud. 632 F.2d at 1335-1336.²¹

In *Diaz-Munoz*, the defendants moved prior to trial for severance of the tax counts, contending that they were totally unrelated to the counts charging embezzlement and insurance fraud and, therefore, could not be joined with those counts under Rule 8. The government responded that "[t]he proof at trial will show the alle-

²¹ The panel in *Diaz-Munoz* relied upon subsection (a) of Rule 8 in analyzing the severance question regarding the propriety of joining counts charging tax offenses with counts charging non-tax offenses, even though that case involved multiple defendants. Given the well established precedent in the Fifth Circuit, as well as in other circuits, that subsection (a) has no application to cases involving more than one defendant, see authority cited in text *supra*, we can only conclude that the panel's reliance upon that subsection resulted from an oversight, rather than from an intentional action to reformulate the rules governing the applicability of the provisions of Rule 8. Of course, adherence to a subsection (b), rather than a subsection (a), analysis in *Diaz-Munoz* would in no way have affected the result in that case, since the critical term distinguishing the two subsections ("of the same or similar character") was not at issue therein.

gations of the subject counts to be part of a series of transactions which began with the acts of fraud and were concluded when the fraudulent income was not reported as income to the Internal Revenue Service." 632 F.2d at 1335. Accepting the government's representation that the counts would be connected up at trial, the district court denied the motions for severance.

At trial, however, the government failed to produce any evidence tending to prove a connexity between the tax counts and the non-tax counts, and even conceded this point at oral argument. 632 F.2d 1336. The appellate panel found that in representing to the court that the counts were part of a series of transactions, the government "assumed the risk that its proof would fail" and, accordingly, had to bear the consequences appertaining to that risk. 632 F.2d at 1336.

Thus, the decision in *Diaz-Munoz* was based upon the government's failure to prove a nexus between the tax and non-tax counts and does not, as appellants argue, stand for the proposition that joinder of tax and non-tax offenses in a single indictment is per se improper. Indeed, there would be no legal or logical basis for such a rule and, in fact, there is ample authority supporting the position that tax counts can properly be joined with non-tax counts where it is shown that the tax offenses arose directly from the other offenses charged. *United States v. Beasley*, 519 F.2d 233, 238 (5th Cir. 1975), vacated on other grounds, 425 U.S. 956, 96 S. Ct. 1736, 48 L. Ed. 2d 201 (1976); *United States v. Kenny*, 645 F.2d 1323, 1334-1345 (9th Cir. 1981); *United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir. 1977), cert. denied, 434 U.S. 1064, 98 S. Ct. 1239, 55 L. Ed. 2d 765 (1978); *United States v. Isaacs*, 493 F.2d 1124, 1158-1159 (7th Cir.), cert. denied, 417 U.S. 976, 94 S. Ct.

3184, 41 L. Ed. 2d 1146 (1974). Assumably, had the government been able to fulfill its pretrial representation that the evidence would establish that the unreported income charged in the tax counts constituted the proceeds of the embezzlement and/or insurance fraud offenses charged in the other counts, the result in *Diaz-Munoz* would have been different.

The pertinent focus in misjoinder claims of this type is not upon the nature of the offenses that are joined together, but upon whether the terms of Rule 8(b) have been met, that is to say, whether the offenses arose from the "same series of acts or transactions." In order to constitute a "series" of acts or transactions under Rule 8(b), there must be "substantial identity of facts or participants" among the various offenses. *United States v. Marionneaux, supra*, 514 F.2d at 1249.

It is well established that substantive offenses arising out of a single conspiracy can properly be joined, since the conspiracy provides a common link connecting the offenses. *United States v. Phillips, supra*, 664 F.2d at 1016; *United States v. Gentile, supra*, 495 F.2d at 631-632; *Gordon v. United States*, 438 F.2d 858, 878 (5th Cir. 1971); *United States v. Adams*, 581 F.2d 193, 197 (9th Cir. 1978); *United States v. Bernstein*, 533 F.2d 775, 789 (2d Cir.), cert. denied, 429 U.S. 998, 97 S. Ct. 523, 50 L. Ed. 2d 608 (1976); *United States v. Somers*, 496 F.2d 723, 729-730 (3d Cir.), cert. denied, 419 U.S. 832, 95 S. Ct. 56, 42 L. Ed. 2d 58 (1974); 1 C. Wright, *Federal Practice and Procedure* § 144 (1969).²² In other

²² Appellant Vanderwyde cites *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), for the principle that there must be a determination, absent the conspiracy count, as to whether joinder is proper under Rule 8(b), but the case does not even remotely embrace such a principle. In *Levine*, joinder of certain offenses

words, the fact that the substantive offenses emanated from a single, central conspiracy is a sufficient indication that substantial identity of facts or participants exists among the offenses.

In the instant case, the government alleged and succeeded in proving that the tax counts and the non-tax counts were part of a series of acts or transactions arising from the conspiracy and criminal enterprise charged in Counts 1 and 2 of the indictment, respectively. Counts 58 through 67 charged appellants Barone (58-62) and Boyle (63-67) with filing false income tax returns. Counts 68 through 70 charged appellants Morales and Raymond and Dorothy Kopituk with assisting in the preparation of fraudulent corporate income tax returns on behalf of their company, Florida Welding Services Corp., by claiming false business deductions.

The government's proof at trial showed that the unreported income that formed the basis of the tax offense counts against Barone and Boyle stemmed from funds they received as a result of their participation in the conspiracy and the criminal enterprise that constituted the foundation for all the other charges against them. Similarly, the government's proof showed that the unlawful business deductions claimed by Morales and the Kopituks on behalf of Florida Welding Services Corp. stemmed from illegal payments they made in connection with their participation in the conspiracy and criminal enterprise.

and defendants was found to be improper because the offenses were actually part of two separate and distinct conspiracies. 546 F.2d at 665-666. The court simply held that there was an insufficient identity of facts or participants involved in the two conspiracies to constitute a "series" of acts under Rule 8(b). 546 F.2d at 666.

The tax offenses were thus part of a series of acts committed in furtherance of the overall conspiracy. In the case of the unreported income received by Boyle and Barone, the filing of false income tax returns operated to maximize the benefits enjoyed as a result of their participation in the conspiracy and, of course, facilitated their efforts to avoid detection of the criminal enterprise. As for the fraudulent deductions claimed on behalf of Florida Welding Services Corp., the preparation of false corporate income tax returns enabled the Kopituks and Morales to minimize the adverse financial impact of the illegal payoffs they were making in order to acquire waterfront business.²³ Accordingly, since the tax offenses arose directly and solely out of the other offenses committed in furtherance of the conspiracy, they were properly joined under Rule 8(b).

(2) *Prejudicial Joinder*

Fed. R. Crim. P. 8 sets "the limits of tolerance" on the process of joinder of offenses and defendants. *United States v. Bova*, *supra*, 493 F.2d at 36. If those limits are exceeded, joinder becomes *misjoinder* and is deemed to be inherently prejudicial. Where there is misjoinder, severance under Rule 8 is mandatory. *United States v. Levine*, *supra*, 546 F.2d at 661; *United States v. Marionneaux*, *supra*, 514 F.2d at 1248; *United States v. Bova*, *supra*, 493 F.2d at 35-36.

Nevertheless, joinder of defendants or offenses, even though proper under the terms of Rule 8, can be so

²³ Since Rule 8 was designed to facilitate trial convenience and efficiency by avoiding duplicative proceedings, see 8 J. Moore, *Moore's Federal Practice* ¶ 8.02[1] (2d ed. 1981), it is noteworthy that proof of the overall conspiracy and criminal enterprise comprised a substantial portion of the proof necessary to prosecute the tax offenses.

prejudicial as to require severance under *Fed. R. Crim. P.* 14.²⁴ The decision of whether relief is appropriate under Rule 14, however, is entrusted to the sound discretion of the district court and is reviewable on appeal only for abuse of that discretion. *United States v. McCulley*, 673 F.2d 346, 349 (11th Cir. 1982); *United States v. Kabbaby*, 672 F.2d 857, 861 (11th Cir. 1982); *United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980); *United States v. Maronneaux*, *supra*, 514 F.2d at 1248; *Tillman v. United States*, 406 F.2d 930, 933 n.5 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S. Ct. 2143, 23 L. Ed. 2d 742 (1969).

Having determined that joinder in this case was proper under Rule 8, it becomes necessary to consider appellants' claims of prejudicial joinder under Rule 14. Some of these claims raise constitutional questions which, while distinct from the issue of joinder, are nevertheless related. Accordingly, they will be dealt with in this section.

Appellants Turner, Williams, Morales and the Kopituk's contend that they were prejudiced by the existence of antagonistic defenses that resulted from the government's decision to jointly indict both the union officials and the waterfront employers, and that the lower court erred in denying their respective motions for severance. The crux of this argument concerns the defense of co-defendant Neal L. Harrington, a waterfront employer who was, in fact, ultimately severed during trial.

²⁴ Rule 14 reads in pertinent part as follows:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Harrington, as noted in the facts section of this opinion, was co-owner of a Miami-based steamship agency and stevedoring company during the period covered by the indictment. He was charged with making illegal payoffs to union officials in return for labor peace. At the beginning of trial, counsel for Harrington informed the court of Harrington's intention to rely upon an "economic duress" theory of defense, i.e., Harrington would admit making illegal payoffs to union officials but would claim that he did so under economic coercion. Counsel for Harrington told the court and other counsel that he intended to pursue this course in his opening statement.

Several of the appellants moved for a severance at that point, contending that Harrington's position was prejudicial to their own, since they would be denying any and all participation in the criminal enterprise. The trial judge declined to order a severance at that point, reserving a final ruling until the trial had progressed to a stage where the issue would be more clearly focused. In order to avoid any possible prejudice in the interim, the court instructed counsel for Harrington to limit the scope of his opening statement to what he believed the government would or would not be able to prove with respect to his client alone. The court told counsel for Harrington that he would be permitted to make a second opening statement at the close of the government's case if it were ultimately decided that his client would not be severed.

During his opening statement, counsel for Harrington told the jury that "the Government's evidence will show that physically certain things took place; physically certain money passed." (4:110). Further on, he stated: "Now, the Government has indicated in its opening

statement—and I concur that the evidence will show that that was a way of life on the docks—the Government has contended in their opening statement that the enterprise,—.” (4:111). At that point, an objection was interposed and sustained, and the court advised counsel to remember the previous order. No other statements were made that even remotely implicated Harrington’s co-defendants.

Late in the trial, but before Harrington ever had an opportunity to introduce evidence on his own behalf to support his economic duress theory, the court ordered him severed from the trial. Appellants contend that the district court abused its discretion when it failed, alternatively, to sever Harrington at the beginning of the trial or to sever them once it became apparent that Harrington’s defense was clearly irreconcilable with their own.

To show an abuse of discretion by a district court in refusing to grant a motion for severance, a defendant must demonstrate that the joint trial subjected him to compelling prejudice against which the trial court was unable to afford protection. *United States v. Harper*, 11 Cir. 1982, 680 F.2d 731; *United States v. Kabbaby*, *supra*, 672 F.2d at 861; *United States v. Tombrello*, 666 F.2d 485, 492 (11th Cir. 1982); *United States v. Swanson*, 572 F.2d 523, 528 (5th Cir.), cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978). In the context of an antagonistic defense claim, it is necessary to show not simply that the defenses were antagonistic, but that they were irreconcilable and mutually exclusive. *United States v. Mota*, 598 F.2d 995, 1001 (5th Cir. 1979); *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978); *United States v. Swanson*, *supra*, 572 F.2d at 529.

In the case *sub judice*, the trial court ultimately became convinced that Harrington's defense was irreconcilable with those of his co-defendants and ordered that he be severed from the trial. In so doing, the court fulfilled its "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516, 80 S. Ct. 945, 4 L. Ed. 2d 921 (1960). Consequently, the only question is whether the action of the trial court in severing Harrington was "too little, too late," that is, whether appellants had already suffered compelling prejudice warranting reversal of their convictions. We think not.

Appellants rely upon *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), and *United States v. Crawford*, *supra*, to support their position, but each case is readily distinguishable. In *Johnson*, two defendants, Johnson and Smith, were jointly tried on a charge of passing counterfeit bills. Johnson's defense at trial was that he was not present when the crime was committed. Smith, on the other hand, admitted that he and Johnson passed the counterfeit bills, but claimed that he was working as an informer for the municipal police department at the time. Indeed, the foundation of Smith's entire defense consisted of laying the blame upon Johnson and a third party. As the appellate panel observed, "[a] study of the record reveal[ed] that Smith's attorney implicated Johnson at every opportunity." 478 F.2d at 1133.

Accordingly, the court of appeals reversed Johnson's conviction, finding that, while severance was not mandatory prior to trial, "as the trial progressed it became clear that the prejudice to Johnson of defending at a joint trial with Smith outweighed any possible disruption in the judicial process which would result from having separate

trials." 478 F.2d at 1134. In so finding, the court noted that there were only two defendants "and it would not have been very time consuming, but entirely practicable, to have accorded them separate trials." 478 F.2d at 1134.

In *United States v. Crawford*, *supra*, two defendants, Crawford and Blanks, were jointly tried on a charge of possessing an unregistered sawed-off shotgun. At trial, the sole defense of each defendant was to incriminate the other:

Blanks incriminated Crawford and exculpated himself at every opportunity. Crawford, on the other hand, attempted to show that he was not culpable because Blanks alone had possession of the firearm. Each was the government's best witness against the other. Each defendant had to confront not only hostile witnesses presented by the government, but also hostile witnesses presented by his co-defendant.

581 F.2d at 492. In light of such circumstances, the court reversed the convictions, noting that "[b]ecause the evidence was uncomplicated and only two defendants were involved, the inconvenience and expense of separate trials would not have been great." 581 F.2d at 492.

The instant case differs substantially from both the *Johnson* and *Crawford* cases in two major respects—the degree of prejudice inhering in the respective cases as a result of the joint trials and the degree to which the interest of judicial economy was served by the decision to pursue joint, rather than separate, trials. The degree of prejudice suffered by the defendants in the *Johnson* and *Crawford* cases was truly compelling. In both cases, there were, in effect, two prosecutors—the government and the co-defendant. The defendants in *Johnson* and *Crawford*, respectively, were inseparably intertwined due to the fact that, in each case, there were only two

defendants charged with a single offense. This made it impossible for any defendant to escape the prejudicial impact ensuing from his co-defendant's "He did it" defense. Despite this fact, the trial court in each case refused to grant a severance even when the irreconcilable nature of the defenses clearly manifested itself.

To the contrary, in the instant case, the trial judge properly exercised his authority to sever Harrington once it became apparent that his defense was irreconcilable with that of the defendant union officials. Consequently, unlike the situation in *Johnson* and *Crawford*, Harrington never had the opportunity to offer his testimony or other evidence directly implicating his co-defendants.

Appellants seize upon the statements made by counsel for Harrington during his opening statement, see text *supra*, as the primary evidence of prejudice arising from his antagonistic defense. As noted, Harrington's counsel stated that the government's evidence would show that "physically certain money passed" and acknowledged that such conduct was a "way of life on the docks."²⁵ Beyond that, appellants obliquely refer to the antagonistic nature of Harrington's cross-examination of government witnesses.

Nowhere, however, is it asserted that Harrington's attorney directly "pointed the finger" at or apportioned the blame upon any particular appellant herein, as was the case in both *Johnson* and *Crawford*. Moreover, because there were many defendants and many charges involved in the trial below, there was no "inseparable intertwining" between Harrington and the other defend-

²⁵ It is unlikely that these two statements, made at the opening of trial, played any part in the jury's verdicts returned more than seven months later.

ants. Any negative implications raised by Harrington's counsel were thus diffused, rather than concentrated upon any particular individual, thereby diminishing the likelihood of prejudicial impact.

This case is somewhat similar to *United States v. Mota*, *supra*, wherein the court of appeals rejected a claim of prejudice based on antagonistic defenses. Mota and Flores were charged together with federal drug offenses. At the joint trial, counsel for Flores stated in his opening statement that the evidence would show Flores did indeed commit the offense charged, but that he was insane at the time. Mota contended at trial and on appeal that he was prejudiced by such statements, arguing that the admission by Flores' counsel implicated him as well since both defendants were charged with committing the same offense at the same time and place.

The court of appeals rejected the argument, attaching significance to the fact that the concession was made by counsel during opening statement and not by Flores himself. 598 F.2d at 1000. The court found that any risk of prejudice was diminished by the instruction to the jury that the comments of counsel were not evidence and were not to be considered as such. 598 F.2d at 1000. A similar instruction was given in the instant case. (107:43). See also *United States v. Vadino*, 11 Cir., 1982, 680 F.2d 1329 (assertion of entrapment defense by one defendant does not necessarily entitle co-defendant who denies all involvement in the offense to a severance).

The second major distinction between the instant case and those relied upon by appellants involves the relative degree to which the interest of judicial economy was served by opting for joint, rather than separate, trials. The appellate decisions in both *Johnson* and *Crawford* emphasized the minimal demand that the holding of

separate trials would make upon judicial resources inasmuch as the original joint trials were uncomplicated and involved only two defendants. Conversely, trial of the instant case lasted seven months, involved 12 defendants, and necessitated the calling of 130 witnesses. The demand upon scarce judicial resources was enormous. Because it was necessary to prove the existence of the criminal enterprise and underlying conspiracy with respect to each defendant, a substantial part of the government's proof would necessarily have had to be repeated for each defendant who was granted a separate trial. The interest of judicial economy was thus well-served by proceeding with a joint trial.

Of course, the interest of the public and the government in efficiently utilizing judicial resources would never justify denying a person a fair trial. If a person demonstrates that he will incur compelling prejudice if forced to undergo a joint trial, a severance must be granted, regardless of the impact on judicial economy. Nevertheless, it must be recognized that joint trials involving numerous defendants and offenses almost inevitably present a danger of some degree of prejudice to the participants. *United States v. Levine, supra*, 546 F.2d at 662; *Cupo v. United States, supra*, 359 F.2d at 993. This imposes a duty upon the court to balance the defendant's allegations of prejudice against the interest of judicial economy and concomitant policy favoring joint trials in conspiracy cases. *United States v. Mota, supra*, 598 F.2d at 1000; *United States v. Swanson, supra*, 572 F.2d at 528.

We find that the degree of prejudice suffered by appellants resulting from the trial court's refusal to sever defendant Harrington until late in the trial was slight when compared with the substantial countervailing

interest of judicial economy. Accordingly, the trial court did not abuse its discretion in denying appellants' motions to sever based upon Harrington's antagonistic defense.

Appellants Williams²⁶ and Field make a separate but related claim that they were prejudiced by the defense strategy adopted by appellant Boyle, whose counsel admitted in closing argument that Boyle was guilty of receiving money on several occasions (Taft-Hartley Act violations) but was innocent of the more serious charges such as conspiracy and extortion. Field's entire argument hinges upon the Sixth Amendment confrontation clause, that is, Field argues that his right to confront the witnesses against him was violated because he was unable to cross-examine Boyle, who declined to testify at trial.

This argument is fatally flawed by the fact that none of the statements made by Boyle's attorney incriminated Field or any of the other appellants. The statements of Boyle's counsel merely conceded that Boyle alone, one of 12 defendants on trial, committed some violations of the Taft-Hartley Act. As such, they were insufficient justification to characterize Boyle as a "witness against" Field so as to entitle Field to the right to cross-examine Boyle. It simply cannot be said that the statements at issue seriously prejudiced any of the appellants, particularly in light of the court's numerous instructions to the jurors that they were to evaluate each defendant and the charges and evidence against him (or her in the case of Dorothy Kopituk) separately. (99:58, 63-64, 135; 101:76; 107:40, 44-45, 94).

Field also contends that, since he was unable to cross-examine Boyle regarding his admissions, he should have

²⁶ Williams raises this claim, but does not argue it in any detail.

been permitted to comment upon Boyle's decision not to testify. In support of this contention, Field relies upon *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). In *DeLuna*, two defendants, DeLuna and Gomez, were jointly indicted on a federal narcotic charge. They were arrested after police observed Gomez throw the narcotics out his car window. At trial, Gomez testified that he had never seen the package of narcotics until DeLuna handed it to him and told him to throw it out the window. DeLuna declined to testify, but his attorney attempted to fix the sole blame upon Gomez. During closing argument, counsel for Gomez made reference to the failure of DeLuna to take the stand, telling the jury that "at least one man was honest enough and had courage enough to take the stand and subject himself to cross examination, and tell you the whole story . . ." 308 F.2d at 142 n.1. DeLuna was convicted and Gomez was acquitted.

On appeal, DeLuna's conviction was overturned. The panel concluded that he had an absolute privilege to exercise his right to remain silent free from the prejudicial comments of his co-defendant's attorney. The panel found further, however, that counsel for Gomez had a duty to make such prejudicial comments for the benefit of his client, stating:

If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.

308 F.2d at 141.

In *United States v. Kahn*, 381 F.2d 824 (7th Cir. 1976), the Seventh Circuit Court of Appeals construed the right recognized in *DeLuna* as limited to situations

where it is shown that "real prejudice" will result unless the defendant is allowed to comment upon the failure of his co-defendant to testify. 381 F.2d at 840.

The question as we see it is how essential is it to a fair and complete defense, an attribute of a fair trial, that defendants be permitted to comment upon a co-defendant's exercise of his right against self-incrimination. The procedural difficulties and the complication of joint trials arising from the rule suggested by dicta in *DeLuna* are so great that we cannot say there is an absolute right, without reference to the circumstances of defense at trial, for a defendant to comment on the refusal of a co-defendant to testify.

381 F.2d at 840.

The circumstances in the case *sub judice* did not justify any comment on behalf of Field regarding Boyle's failure to testify. To begin with, it does not appear that Field even requested that he be permitted to make such a comment. Indeed, it would have been a somewhat inane strategy for Field's attorney to condemn Boyle's failure to testify when Field himself did not testify. More importantly, because the statements of Boyle's counsel did not inculpate Field or any other defendant, there was no basis under the law emanating from *DeLuna* and *Kahn* for making any comment upon Boyle's decision to remain silent. Those cases authorize such comments only where an attorney has a clear "duty" to make them, 308 F.2d at 141, in order to avoid "real prejudice" to his own client. 381 F.2d at 840. In this case, there was no such prejudice and, hence, no such duty. The trial court, therefore, did not err in denying appellants' motions for severance grounded upon the statements of Boyle's attorney during closing argument.

Appellant Williams next contends that he was prejudiced by a joint trial in that he was prohibited from eliciting Teitlebaum's testimony concerning a discussion in which appellant Boyle told him that Williams might have to be killed. At one point during the course of the conspiracy, Williams was running for a higher union office and had, according to Teitlebaum, threatened to report appellants Turner and Field to the Department of Labor and the Internal Revenue Service unless they supported his election bid. Boyle told Teitlebaum that unless Williams "straighten[ed] up" they might have to kill him. (29:58-60). After discussing the matter with counsel outside the presence of the jury, the trial judge ruled that the testimony was inadmissible because it was not relevant to any issue involved in the case. (29:64-65). Consequently, the testimony was not excluded, as Williams contends, due to a conflict arising from the fact that it was a joint trial, but rather because it was irrelevant.

Determinations as to the relevance of evidence are well within the broad discretion of the trial court and will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Williams v. Hoyt*, 556 F.2d 1336, 1339 (5th Cir. 1977), cert. denied, 435 U.S. 946, 98 S. Ct. 1530, 55 L. Ed. 2d 544 (1978); *United States v. Linetsky*, 533 F.2d 192, 204 (5th Cir. 1976); *United States v. Calles*, 482 F.2d 1155, 1160 (5th Cir. 1973); *United States v. Allison*, 474 F.2d 286, 288-289 (5th Cir. 1973). The trial court did not abuse its discretion in refusing to admit the testimony of Teitlebaum's conversation with Boyle.

Several appellants claim they were prejudiced by the length and complexity of the joint trial. These factors, appellants claim, combined to deprive them of a fair

trial because it was impossible for the jury to reach an intelligent individualized verdict with respect to each defendant. Admittedly, the proportions of the trial below were somewhat extraordinary: 12 defendants, 130 witnesses, 22,000 pages of trial transcript, seven months of trial, 70-count indictment. Nevertheless, while we do not endorse the government's modern penchant for drawing together evermore complex and extensive conspiracies into a single indictment, we are unable to conclude that appellants suffered compelling prejudice as a result of the scope and breadth of the trial below. Consequently, they were not entitled to a severance under Rule 14. *United States v. Harper, supra*, at 733; *United States v. Kabbaby, supra*, 672 F.2d at 861; *United States v. Tombrella, supra*, 666 F.2d at 492; *United States v. Swanson, supra*, 572 F.2d at 528.

The pertinent inquiry in reviewing this question on appeal is whether the jury was able to "individualize each defendant in his relation to the mass." *Kotteakos v. United States*, 322 U.S. 750, 773, 66 S. Ct. 1239, 1252, 90 L. Ed. 1557 (1946). The correlative concern is that the jury may allow the evidence produced with respect to one defendant or one offense to "spillover" and influence their decision regarding a different defendant or a different offense. The most efficacious tool to protect against this danger is a clear cautionary instruction from the trial court as to the duty of the jurors to consider each defendant and the evidence against him or her separately. *United States v. Morrow*, 537 F.2d 120, 136 (5th Cir. 1976), cert. denied, 430 U.S. 956, 97 S. Ct. 1602, 51 L. Ed. 2d 806 (1977). The most telling, and really the *only*, means through which to measure the jurors' collective adherence to such an instruction is to look at the verdict. Convictions will generally be

upheld if it can be inferred from the verdict that the jury "meticulously sifted the evidence" as demonstrated by its decision to acquit on certain counts. *Tillman v. United States, supra*, 406 F.2d at 936, quoting 8 J. Moore, *Moore's Federal Practice* § 14.04[1] at 14-15 (2d ed. 1968).

As noted *supra*, the trial court in the case *sub judice* gave precise instructions to the jurors that they should give separate consideration to each defendant on each count. Moreover, the court reiterated this directive several times. (99:58, 63-64, 135; 101:76; 107:40, 44-45, 94). The verdicts returned by the jury reflect that the jurors fulfilled their duty in this regard. The jury returned split verdicts as to four of the nine appellants and was unable to reach a verdict at all as to one defendant.

In reaching our determination that appellants were not unduly prejudiced by the length and complexity of the joint trial, we are guided by recent cases of similar magnitude that have rejected the same argument. See, e.g., *United States v. Phillips, supra*, 664 F.2d at 1016-1017 (six month trial; 36-count, 100 page indictment; 12 defendants); *United States v. Martino*, 648 F.2d 367, 385-386 (5th Cir. 1981) (20 defendants, most with Spanish or Italian surnames; 35-count indictment; three month trial; more than 200 witnesses); *United States v. Morrow, supra*, 537 F.2d at 135-137 (23 defendants). These and other cases teach that it is not enough simply to show that the trial was lengthy and/or complex. It is necessary to demonstrate with particularity compelling prejudice and appellants have failed in this regard. We believe the trial court's cautionary instructions sufficed, as evidenced by the jury's verdict, to minimize any pernicious effect that might otherwise have resulted from

the length and complexity of the joint trial.²⁷ Finally, we would be remiss in failing to note that where, as in the case herein, conspirators have created an extensive and far-flung conspiracy, deviously constructed and pursued, it is their unlawful conduct that produces a complex trial and, accordingly, they have no basis to insist that they be insulated from its complexities.

The final severance issue warranting discussion is appellant Williams' claim that he was improperly forced to undergo a joint trial in Miami rather than a separate trial in Jacksonville. While framed in terms of a due process claim, this argument amounts to an assertion that the district court abused its discretion in refusing to sever Williams and transfer his case to the Jacksonville Division of the United States District Court for the Middle District of Florida.

Fed. R. Crim. P. 21(b) provides that a court "may", upon motion of the defendant, transfer a criminal proceeding to another district "for the convenience of parties and witnesses, and in the interest of justice."²⁸ Williams filed a Rule 21 motion three weeks prior to

²⁷ As a tangential argument to the complexity claim, appellants Morales and the Kopitiks contend they were denied a fair trial by the fact that only a small portion of the testimony presented at trial related to them. In *United States v. Morrow, supra*, the court rejected a similar challenge based upon the quantum of evidence presented against particular defendants therein, concluding that, "[n]eedless to say, more is required to overturn on appeal the district court's exercise of discretion in denying a motion for severance." 537 F.2d at 137.

²⁸ Rule 21(b) provides in full as follows:

(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

trial²⁹ claiming he would suffer extreme prejudice from the inconvenience of having to stand trial in Miami, rather than in Jacksonville, where he resided.³⁰ He cited several financial reasons, including an inability to absorb the expenses of accommodations in and travel to Miami, as well as the expenses and fees of his attorney. The motion was denied.

The prejudice of which Williams complains manifested itself in the fact that on several occasions during trial Williams was, over the government's objection, permitted to excuse himself from the proceedings to attend to personal or business obligations back in Jacksonville. Counsel for Williams was also permitted to absent himself

²⁹ The fact that Williams' motion was filed only three weeks prior to trial was a sufficient reason in and of itself justifying its denial. *Fed. R. Crim. P.* 22 provides that "[a] motion to transfer under these rules may be made at or before arraignment or at such time as the court or these rules may prescribe." Williams was arraigned on June 15, 1978, seven months prior to the filing of his Rule 21 motion. In *Cagnina v. United States*, 223 F.2d 149 (5th Cir. 1955), the fact that a defendant's motion for transfer was filed "many weeks" after arraignment and just one week prior to trial was held to be an adequate ground for denying the motion. 223 F.2d at 154.

³⁰ Williams does not contend on appeal, although he apparently did so in the lower court, that venue was improperly laid in the Southern District of Florida. Venue in a conspiracy case is proper in any judicial district in which the conspiratorial agreement was formed or in any district where an overt act was committed in furtherance of the conspiracy. *Hyde v. United States*, 225 U.S. 347, 363, 32 S. Ct. 793, 800, 56 L. Ed. 1114 (1912); *United States v. Williams*, 424 F.2d 344, 352 (5th Cir. 1970); *Bellard v. United States*, 356 F.2d 437, 438 (5th Cir.), cert. denied, 385 U.S. 856, 87 S. Ct. 103, 17 L. Ed. 2d 83 (1966); *Miller v. Connally*, 354 F.2d 206, 308 (5th Cir. 1965). Clearly, the bulk of the overt acts charged in the indictment occurred in Miami. Similarly, it appears clear that the underlying agreement was formulated in Miami.

from the proceedings on numerous occasions. On appeal, the absences of Williams' attorney are attributed to an effort to reduce the expenses he would otherwise have incurred on Williams' behalf. The record makes it clear, however, that counsel's absences were motivated in large part by his concern for the continued well-being of his Jacksonville law practice.³¹ While this is perhaps understandable from the attorney's point of view, it does much to deflate Williams' hardship claim. More important than the reasons for the absence of Williams' counsel is the fact that at no time during the proceedings was Williams without legal representation. Early in the trial, counsel for Williams enlisted the services of another attorney in the case and made it clear to the court that the other attorney "has been regularly associated as counsel with me and he will be representing Mr. Williams throughout the trial in association with me." (30:100).

Moreover, Williams and his attorney were not the only persons required to absent themselves from the trial from time to time. The trial judge, recognizing that "there still is a problem of life to some extent going on on the outside" (14:223), frequently accommodated the requests of various attorneys and defendants to be excused from the trial proceedings. It was, after all, a seven month trial. This was generally permitted, how-

³¹ At one point Williams' attorney told the court that representing Williams in Miami was a "first class problem," and that he was not sure his Jacksonville law practice could endure the strain. (37:148-149). Accordingly, he requested that attorneys in the case not be required to be present unless "we absolutely know that there is something coming in against our client." (37:149). It is clear, therefore, that the absences of Williams' attorney were attributable as much to his own "hardship" concerns as to those of his client. Williams, of course, had the option of retaining a Miami-based attorney from the beginning.

ever, only at times where it was clear that the on-going proceedings would not directly involve the absent defendant or attorney. (14:223). Significantly, Williams does not point to any particular event that resulted in prejudice to him. He does not, e.g., claim that he was unable to effectively cross-examine any witness against him, that he was unable to contest the admissibility of any material evidence against him, or that he was unable to pursue any particular line of defense.

It undoubtedly would have been more convenient for Williams to have undergone trial in Jacksonville rather than Miami. It was not, however, patently unfair to force Williams to stand trial in Miami. While most of the illegal activity charged against Williams transpired in Jacksonville, it was not limited solely to that city. His outside activity included: accepting the \$400 "down payment" on Teitlebaum's Jacksonville operation while in Miami; requesting Boyle, who was in Miami, to obtain some cruise tickets from Teitlebaum, who was also in Miami; and conducting the union contract negotiation meeting with Ramon DeMott and James Hodges in Savannah. Thus, as the government notes in its brief, this is not a case where a defendant who has engaged in no misconduct outside his home district is hauled away to some remote district to stand trial.

Moreover, Rule 21 accords weight not just to the convenience of the defendant, but to the convenience of all "parties and witnesses." We have already discussed the government's interest in judicial economy and how the "convenience" of the government is fostered by the policy favoring joint trials for persons who are properly joined together in a single indictment. If Williams was entitled to a separate trial in Jacksonville, then surely co-defendant Elizah Jackson was entitled to a separate

trial in Savannah and co-defendant Isom Clemon was entitled to a separate trial in Mobile. Such an approach, however, would deprive the valid interest in judicial economy of all force. Rather than try each defendant separately in his respective place of residence, the government chose the next best option—it sought and obtained a joint indictment in Miami, the most convenient forum for the overwhelming majority of witnesses and defendants.

A criminal defendant does not have a constitutional right to be tried in the district encompassing his residence. *Platt v. Minnesota Mining and Manufacturing Co.*, 376 U.S. 240, 245, 84 S. Ct. 769, 722, 11 L. Ed. 2d 674 (1964). Since venue properly laid in the Southern District of Florida (see note 30, *supra*), Williams was properly indicted and brought to trial in Miami. The decision of whether to grant Williams' motion to transfer under Rule 21 was within the trial court's discretionary authority and is reviewable only for abuse of discretion. *United States v. Pry*, 625 F.2d 689, 691 (5th Cir. 1980), *cert. denied*, 450 U.S. 925, 101 S. Ct. 1379, 67 L. Ed. 2d 355 (1981); *United States v. Juarez*, 573 F.2d 267, 280 (5th Cir.), *cert. denied*, 439 U.S. 915, 99 S. Ct. 289, 58 L. Ed. 2d 262 (1978); *United States v. Walker*, 559 F.2d 365, 372 (5th Cir. 1977). The policy favoring joint trials in conspiracy cases, the convenience of most of the witnesses and defendants, and the fact that Williams has failed to particularize any real prejudice, all lead to the conclusion that the trial court did not abuse its discretion in refusing to sever Williams and transfer his case to Jacksonville.

C. Sufficiency of Evidence

Six of the nine appellants (Field, Vanderwyde, Williams, Morales, Raymond Kopituk and Dorothy Kopituk)

argue that the evidence produced at the trial below was legally insufficient to support their convictions. The standard to be applied in reviewing such claims is "whether a jury could reasonably find that the evidence was inconsistent with every reasonable hypothesis of innocence or, put another way, whether a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt." *United States v. Marx*, 635 F.2d 436, 438 (5th Cir. 1981); accord, *United States v. Arrendondo-Morales*, 624 F.2d 681, 683-684 (5th Cir. 1980); *United States v. Rodgers*, 624 F.2d 1303, 1306 (5th Cir. 1980); *United States v. Witt*, 618 F.2d 283, 284 (5th Cir.), cert. denied, 449 U.S. 882, 101 S. Ct. 234, 66 L. Ed. 2d 107 (1980).

In making that determination, we must view all the evidence in the light most favorable to the government, accepting all reasonable inferences and credibility choices that tend to support the jury's verdict. *Hamling v. United States*, 418 U.S. 87, 124, 94 S. Ct. 2887, 2911, 41 L. Ed. 2d 590 (1974); *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942); *United States v. Marx*, *supra*, 635 F.2d at 438; *United States v. Arrendondo-Morales*, *supra*, 624 F.2d at 684; *United States v. Middlebrooks*, 618 F.2d 273, 278 (5th Cir.), cert. denied, 449 U.S. 984, 101 S. Ct. 401, 66 L. Ed. 2d 246 (1980).

As noted *supra*, all of the appellants herein, with the exception of Dorothy Kopituk, were convicted on the two RICO charges (Counts 1 and 2). The essential elements of a substantive RICO offense, 18 U.S.C. § 1961 *et seq.*, which the government must prove beyond a reasonable doubt, are: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with

the enterprise; (4) that he participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that he participated through a pattern of racketeering activity, i.e., through the commission of at least two racketeering acts. *United States v. Martino, supra*, 648 F.2d at 394.

Culpability under the conspiracy provision of the RICO Act, 18 U.S.C. § 1962(d), is established by a showing that the defendant manifested his assent to participate, either directly or indirectly, in the affairs of the conspiracy through the commission of two or more predicate crimes. *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953, 99 S. Ct. 349, 58 L. Ed. 2d 344 (1978). It is, of course, unnecessary to prove that a conspirator had full knowledge of every detail concerning the conspiracy. Rather, it is sufficient to show that he had knowledge of the "essential nature of the plan." *United States v. Elliott, supra*, 571 F.2d at 903, quoting *United States v. Brasseaux*, 509 F.2d 157, 160 n.3 (5th Cir. 1975).

Moreover, participation in a conspiracy need not be proved by direct evidence. It can be inferred from a "development and a collocation of circumstances." *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (en banc), cert. denied, 440 U.S. 962, 99 S. Ct. 1508, 59 L. Ed. 2d 777 (1979), quoting *Glasser v. United States, supra*, 315 U.S. at 80, 62 S. Ct. at 469. A defendant's participation in a conspiracy may be inferred from acts of his which furthered the objectives of the conspiracy. *United States v. Marx, supra*, 635 F.2d at 439; *United States v. Middlebrooks, supra*, 618 F.2d at 278. Keeping these legal principles in mind, we will proceed to consider appellants' insufficiency of the evidence claims seriatim:

Field

Appellant Field was convicted on the RICO and RICO conspiracy charges (Counts 1 and 2) and on two charges of violating Section 186 of the Taft-Hartley Act, 29 U.S.C. § 141 *et seq.* (Counts 17 and 24).³² While he contends that the sum total of the evidence against him was insufficient to support his conviction on any of those charges, his primary argument is that the district court erred in admitting co-conspirator declarations against him. Without reference to those declarations, he argues, the court would have had no choice but to acquit him on all charges.

Prior to trial, the court held a three day hearing for the purpose of determining the admissibility of extra-judicial co-conspirator declarations against each of the defendants. Although such a hearing was held prior to entry of the *en banc* decision in *United States v. James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917, 99 S. Ct. 2836, 61 L. Ed. 2d 283 (1979), there is no dispute that the trial court employed the correct legal standard, as enunciated in *James*, in ruling that the co-conspirators' out-of-court declarations were admissible against Field.

James requires a showing that, to be admissible under *Fed. R. Evid.* 801(d)(2)(E), a co-conspirators' extra-judicial declaration must have been made: (1) by a person who conspired with the party against whom the declaration is offered; (2) during the course of the conspiracy; and (3) in furtherance of the conspiracy. *United*

³² Title 29 U.S.C. § 186(b)(1) makes it unlawful for any union officer "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value . . ." from any employer, with certain exceptions not applicable herein.

States v. James, supra, 590 F.2d at 578. The standard of proof governing the admissibility of the declarations in a pretrial context is one of substantiality. There must be substantial evidence, independent of the declarations themselves, sufficient to satisfy the three-part test set forth above. 590 F.2d at 581. If, however, co-conspirator declarations are admitted pursuant to a finding that there is "substantial" evidence that the defendant was a member of the conspiracy and that the declarations were made by a co-conspirator during the course of and in furtherance of the conspiracy, the defendant may, upon motion made at the conclusion of all evidence, require the trial judge to re-evaluate the admissibility of the declarations by determining, at that point, where a preponderance of the evidence on that issue lies. *United States v. Grassi*, 616 F.2d 1295, 1300 (5th Cir.), cert. denied, 449 U.S. 956, 101 S. Ct. 363, 66 L. Ed. 2d 220 (1980).

We shall consider whether the independent evidence against Field established by a preponderance of the evidence that he was a member of the conspiracy.³³ The independent evidence against Field showed that in 1966 Field solicited a \$3,000 payoff from Teitlebaum. While Field points to the fact that it was one of his associates, Benny Astorino, who first asked Teitlebaum for the money, the evidence was more than sufficient to infer that Field was the motivating force behind Astorino's request. It was Field who initiated the Miami checkers' union, it was Field who asked Teitlebaum if there was someplace they could talk privately, and it was Field who brought Astorino along on the subsequent fishing trip with Teitlebaum. (9:83-85). Teitlebaum testified

³³ There is no question that the statements admitted against Field were made by members of the conspiracy during the course of the conspiracy and in furtherance thereof.

that Field was sitting only eight feet behind him when Astorino stated that Field was coming to Miami to establish a new checkers' union, that it would be in Teitlebaum's "best interest" to do business with him, and that Teitlebaum could demonstrate his good faith by paying him \$3,000. (9:86-88). Finally, it was Field himself who called Teitlebaum to ask if he had "had a change of heart about the three aces." (9:92).³⁴

In 1973, when Teitlebaum expressed interest in the Mamenic Line account, Field promised that he would assist him in acquiring it. (5:189-191). Field eased Teitlebaum's concerns regarding a Mamenic representative who was working for a competing stevedoring company by telling him that the representative would be "taken care of." (20:14). Teitlebaum reported to Barone that Field had promised to help him obtain the Mamenic account and Barone, after checking into the matter, told Teitlebaum whom to contact within the Mamenic company. (20:21-23). In June 1974,

³⁴ Field argues that evidence of the 1966 solicitation incident should not have been considered in ruling upon the admissibility of co-conspirator declarations against him and should not have been admitted into evidence for the jury to consider in determining Field's guilt or innocence because the incident occurred at a time too remote from later acts charged in the indictment. Field relies upon *United States v. Solis*, 612 F.2d 930 (5th Cir. 1980), to support this contention, but that case is inapposite. In *Solis*, it was held that evidence concerning the defendant's prior crimes "did not, without more, supply substantive proof" of his participation in a later, unrelated conspiracy. 612 F.2d at 934. In the instant case, evidence of the 1966 solicitation was not admitted to show participation in a later, unrelated conspiracy. To the contrary, the 1966 incident was charged as part of the conspiracy for which Field was on trial (the first three overt acts of the conspiracy count [Count 1] relate to the 1966 solicitation from Teitlebaum).

Teitlebaum's company entered into a contract with the Mamenic Line. Teitlebaum compensated the union officials for their assistance by purchasing three sets of cruise tickets which he gave to appellant Boyle. (20:29-30).

In 1976, Field and other union officials solicited tickets from Teitlebaum for a Christmas cruise aboard the Mardi Gras. Appellants Field, Boyle, Barone, and Vanderwyde were all present when Teitlebaum, under pressure from Boyle, telephoned a cruise line representative named Meshulam Zonis and attempted to persuade Zonis to acquire the cruise tickets for him at a reduced charge.³⁵ (25:152-155). The representative insisted that it was impossible for him to do so because the cruise was completely booked. After Teitlebaum's efforts failed, Boyle unsuccessfully attempted to persuade the cruise line representative to procure tickets by warning him that contract renewal time was approaching. (25:156). When it appeared that all further efforts at acquiring the tickets would be futile, Field cursed at Teitlebaum, said that he was not going on the cruise and warned Teitlebaum that he would "repent." (25:157). Field asserts that his refusal to go on the cruise demonstrated that he never participated in the solicitation of the cruise tickets. The fallacious nature of that assertion becomes clear, however, when one views the entire episode in context. Field's angry refusal to go on the cruise came only after it was clear that Teitlebaum was unable or unwilling to purchase the tickets at their full price.

The final piece of independent evidence tending to prove Field's participation in the conspiracy occurred

³⁵ Contrary to Field's assertion that the entire conversation between Teitlebaum and Zonis was spoken in Yiddish, Zonia testified that Teitlebaum spoke only "a couple of words" in Yiddish. (33:254).

in the latter part of 1976 when Field had dinner with Ramon DeMott and James Hodges in Savannah. When Hodges and DeMott complained that their Charleston operation floundered because they were never given the opportunity to submit bids, Field responded, "Don't expect anything for nothing." (11:143). While that statement may not have amounted to a solicitation of money, it did bear on Field's knowledge of and participation in the conspiracy.

We believe that the evidence against Field, independent of any extrajudicial declarations by his co-conspirators, was sufficient to establish Field's membership in the conspiracy by a preponderance of the evidence so as to render the statements of his co-conspirators admissible against him. The independent evidence showed Field personally pressured Teitlebaum for an illegal payoff, furthered the goals of the conspiracy by helping Teitlebaum acquire the Mamenic account for which the union officials were compensated with cruise tickets, and participated in the solicitation of tickets from Teitlebaum for the 1976 Christmas cruise. Moreover, his statement to DeMott and Hodges summed up the central operating doctrine of the entire conspiracy: "Don't expect anything for nothing."

Having concluded that the co-conspirator declarations were properly admitted against Field, the next question is whether those statements, when combined with the independent evidence against him, constituted sufficient evidence to prove his knowing participation in the conspiracy and criminal enterprise. The out-of-court declarations of Field's co-conspirators showed that:

- (1) When Teitlebaum agreed to surrender the Mamenic account in order to acquire the Zim account, Boyle said he would report the decision to Field. (21:41).

(2) When Teitlebaum was considering expanding his business into Mobile, Boyle told him that Field had arranged a meeting between Teitlebaum and co-defendant Isom Clemon, president of the ILA local in Mobile. (24:72). At a meeting in Mobile, Clemon told Teitlebaum and FBI Agent Artin that he would not be meeting with them if he had not received an "okay" from either Boyle or Field. (24:141).

(3) Subsequent to Teitlebaum's meeting with Clemon, Boyle informed Teitlebaum that Field had "underestimated the price" of Teitlebaum's contract in Mobile. (24:84-85).

(4) At one point, when Boyle was pressing Teitlebaum for payment of \$2,400 (\$2,000 from a large payment Teitlebaum received on his Zim account and \$400 for delinquent "peace payments"), Boyle told Teitlebaum that he was going to meet with Field in Savannah and wanted "everyone to know we were up to date." (24:117).

(5) In late 1976, Boyle told Teitlebaum that Field was unhappy with him for refusing to cooperate with Harrington & Company, a competitor of Teitlebaum's which was also making payoffs to the union officials. (24:211).

(6) Boyle and Clemon both told Agent Artin that Field was sharing a payoff arising from a fertilizer transaction Artin was involved in. (38:171; 39:126; 40:57).

(7) With regard to the solicitation of tickets for the 1976 Christmas cruise, Boyle had told Teitlebaum that Field wanted the tickets so that he could take his wife, son and four other people on the cruise. (25:25).

The independent evidence against Field, combined with the co-conspirator statements outlined above, was

sufficient to prove Field's knowing participation in the criminal enterprise and concomitant conspiracy. This same evidence was also sufficient to support Field's convictions on Counts 17 and 24, which charged violations of the Taft-Hartley Act. Field's convictions on those two counts fulfilled the essential element of both the RICO substantive and conspiracy charges that the defendant engage in two or more predicate crimes. Count 17 related to Field's participation in Teitlebaum's expansion into Mobile, which resulted in a \$10,000 payment to the union officials. Count 24 related to Field's participation in the solicitation of tickets for the 1976 Christmas cruise.

Vanderwyde

Appellant Vanderwyde was convicted of the RICO substantive and conspiracy charges (Counts 1 and 2), the Hobbs Act extortion charge (Count 3), and five Taft-Hartley charges (Counts 4, 8, 16, 27 and 43). His argument that the evidence was insufficient to support his conviction on any of those charges is without merit.

Vanderwyde claims the evidence showed only that he was present on occasions when illegal activities were discussed and points out that mere presence at the scene of a crime is insufficient to establish participation in a conspiracy. *United States v. Falcone*, 311 U.S. 205, 209-210, 61 S. Ct. 204, 205-06, 85 L. Ed. 2d 128 (1940); *United States v. Salinas-Salinas*, 555 F.2d 470, 473 (5th Cir. 1977). The evidence adduced at trial, however, was more than sufficient to allow the jury to reasonably find that Vanderwyde was a willing, active participant in the conspiracy and criminal enterprise.

The evidence showed that Vanderwyde accepted money and cruise tickets from waterfront employers and

that he pressured employers to stay current with their payments. Briefly, the evidence against Vanderwyde showed that:

(1) When Teitlebaum finished paying off his cousin's debt to the union, Vanderwyde told him not to let the payments stop. When Teitlebaum asked him what he meant, Vanderwyde responded that they were seeking "control" of the port. (19:128).

(2) When Teitlebaum was behind in his weekly "peace payments," Boyle warned him that if Vanderwyde found out, Teitlebaum would be in serious trouble. (19:209-210).

(3) In the spring of 1975, Boyle obtained cruise tickets from Teitlebaum on behalf of Vanderwyde and others. Vanderwyde did, in fact, go on the cruise. (20:76).

(4) In April 1976, Teitlebaum visited the Miami ILA office to pay Boyle \$250. Boyle was not there, but Vanderwyde was. Vanderwyde told Teitlebaum that he was too far behind in his payments and that \$250 was not enough. He demanded an additional \$500 in cash, which Teitlebaum produced. (24:21-22).

(5) At the same meeting, Vanderwyde told Teitlebaum he wanted to take a cruise on the Mardi Gras and said he needed six pairs of tickets. (24:23). Boyle subsequently gave Teitlebaum a list of the couples who would be taking the cruise. Included on the list were Vanderwyde and his wife. (24:36-37).

(6) When Teitlebaum received a substantial payment from the Zim Line for services rendered to the company at the port of Savannah, Boyle demanded \$2,000 of the amount as partial payment for getting Teitlebaum the contract in Savannah. Subsequently, Vanderwyde

approached Teitlebaum and asked for the money, saying "Boyle told me you have a commitment for him." (24:105).

(7) When Teitlebaum asked Boyle if he could deduct the price of the six pairs of cruise tickets he had previously purchased for the union officials from the \$2,000 he owed for Savannah, Boyle told him to consider the cruise tickets as a gift to Vanderwyde. (24:114).

(8) In September 1976, Vanderwyde reminded Teitlebaum that he still owed the union officials \$4,000 for the privilege of expanding into Mobile. (25:26).

(9) When Teitlebaum told Vanderwyde that a shipping company operator was trying to sell Teitlebaum his company for \$100,000 more than it was worth, Vanderwyde responded that that was too much if the seller intended on keeping all of the money for himself, but "if it . . . [was] for a little division, that . . . [was] something else." (25:161).

(10) After Boyle had told Teitlebaum that Field wanted tickets for the 1976 Christmas cruise, Vanderwyde subsequently reminded Teitlebaum not to forget about the tickets. (25:26).

(11) When George Wagner was making payoffs to the union on behalf of Marine Terminals, Inc., Vanderwyde told Wagner that the payoffs were going into a "pot" and "bitterly complained" because his share of the pot was only \$700 to \$800 per month. (44:77).

(12) Wagner testified that when Boyle was not available, he would frequently deliver MTI's \$1,000 monthly payments to Vanderwyde. (43:74-75).

(13) Vanderwyde also accepted delivery of the \$1,000 monthly payments that were made on behalf of Florida Welding Services Corp. (43:155-156).

(14) Vanderwyde was present at numerous meetings where unlawful activity in furtherance of the conspiracy either transpired or was discussed.

This evidence was clearly sufficient to support the jury's verdict on the RICO counts, for it showed that Vanderwyde actively pursued furtherance of the objects of the conspiracy and enterprise through the commission of at least two predicate crimes.³⁶

The evidence also supported Vanderwyde's conviction on the extortion charge. Title 18 U.S.C. § 1961, known as the Hobbs Act, makes it a crime to obstruct or affect interstate commerce by obtaining the property of another through extortionate means. In order to convict under

³⁶ Vanderwyde was convicted of five separate Taft-Hartley charges, but contends that violations of Section 186(b) of the Taft-Hartley Act do not constitute the requisite racketeering acts under the RICO statute. He relies upon the definition of "racketeering activity" found in 18 U.S.C. § 1961(1)(C), which provides:

(1) "Racketeering activity" means . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations)

Vanderwyde argues that the Taft-Hartley charges against him did not involve "restrictions on payments and loans to labor organizations" and, hence, were not within the purview of the definition of racketeering activity. We agree with the government's contention, however, that the parenthetical language following the reference to Section 186 was included as a means to facilitate identification of 29 U.S.C. § 186 and was not intended to limit the definition of racketeering activity only to Taft-Hartley charges involving "restrictions on payments and loans to labor organizations." A similar argument was rejected by the Second Circuit Court of Appeals in *United States v. Scotto*, 641 F.2d 47, 56-57 (2d Cir. 1980), cert. denied, 452 U.S. 961, 101 S. Ct. 3109, 69 L. Ed. 2d 971 (1981), wherein it was held that violations of 29 U.S.C. § 186(b), which is the subsection of the Taft-Hartley Act within which Vanderwyde's offenses fell, constitute predicate acts of racketeering activity under 18 U.S.C. § 1961(1)(C).

the Hobbs Act, the government need show only that the defendant received the property of another without any lawful claim to such property and that the person who made the payment did so out of fear.³⁷ *United States v. Emmons*, 410 U.S. 396, 399-400, 93 S. Ct. 1007, 1009-1010, 35 L. Ed. 2d 379 (1973); *United States v. Nell*, 570 F.2d 1251, 1258 (5th Cir. 1978). The fear experienced by the victim does not have to be the consequence of a direct threat. It is sufficient if the government can show circumstances surrounding the act of extortion that render the victim's fear reasonable. *United States v. Nell, supra*, 570 F.2d at 1258; *United States v. Quinn*, 514 F.2d 1250, 1266 (5th Cir. 1975), cert. denied, 424 U.S. 955, 96 S. Ct. 1430, 47 L. Ed. 2d 361 (1976). Fear of economic loss is included within the purview of Section 1951. *United States v. Quinn, supra*, 514 F.2d at 1267; *United States v. Jacobs*, 451 F.2d 530, 542 (5th Cir.), cert. denied, 406 U.S. 955, 92 S. Ct. 1170, 31 L. Ed. 2d 231 (1972).

The evidence was sufficient to permit the jury to reasonably conclude that Vanderwyde, together with the other defendants charged in Count 3, obtained money and other articles of value, i.e., cruise tickets, from Teitlebaum through extortionate means. There was, in fact, an implicit threat of economic injury underlying the entire conspiracy. Teitlebaum's weekly "peace payments" were for the purpose of ensuring continued labor peace. Teitlebaum's payments in connection with Mobile and Savannah were necessary in order to receive any waterfront business at those ports. The threat of eco-

³⁷ There is, of course, also a requirement that the extortion affect or obstruct interstate commerce but that element is not in contention here.

nomic loss cast a continuous shadow over Teitlebaum's dealings with the Miami union officials and Vanderwyde played a major role in those dealings.

Finally, there was also sufficient evidence to support Vanderwyde's convictions on the Taft-Hartley charges. As noted *supra*, a violation of Section 186 of that statute is proved by a showing that a union officer accepted any payment of money or other article of value from an employer. The evidence established that Vanderwyde accepted money from Teitlebaum between 1972 and 1977 (Count 4); accepted cruise tickets from Teitlebaum in the spring of 1975 (Count 8); accepted cruise tickets from Teitlebaum in May or June 1976 (Count 16); accepted money from George Wagner at various times between 1970 and 1973 (Count 27); and accepted money on behalf of Morales and the Kopitukas at various times between 1973 and 1975 (Count 43).

Williams

Appellant Williams was convicted on the two RICO charges (Counts 1 and 2) and on two Taft-Hartley charges (Counts 9 and 15). The gist of Williams' attack upon the sufficiency of the evidence is that all of the pertinent evidence against him consisted of the testimony of government witnesses who were not telling the truth. This approach is patently invalid, however, inasmuch as we are required to review the evidence in the light most favorable to the government. That standard requires that all credibility determinations be resolved in favor of the government. *Glasser v. United States*, *supra*, 315 U.S. at 80, 62 S. Ct. 469; *United States v. Marx*, *supra*, 635 F.2d at 438; *United States v. Arrendondo-Morales*, *supra*, 624 F.2d at 684; *United States v. Middlebrooks*, *supra*, 618 F.2d at 278.

This is in accordance with the fundamental rule that credibility determinations lie within the sole province of the trier of fact. *United States v. Phillips, supra*, 664 F.2d at 1032; *United States v. McCrary*, 643 F.2d 323, 328 (5th Cir. 1981); *United States v. De Los Santos*, 625 F.2d 62, 65 (5th Cir. 1980). Accordingly, we are not in a position to evaluate the relative credibility of the witnesses who testified against Williams. Suffice it to say that the testimony of those witnesses was more than adequate to establish Williams' guilt on the two RICO counts, as well as on the two Taft-Hartley counts. The evidence against Williams can be summarized as follows:

- (1) In the Spring of 1975, Williams contacted Boyle about obtaining some cruise tickets from Teitlebaum. (20:71). Teitlebaum purchased the tickets at his own expense and gave them to Boyle. (20:73).
- (2) In October 1976, Teitlebaum met with Williams in Miami to discuss expanding his stevedoring operation into Jacksonville. They agreed that Teitlebaum would pay Williams \$1,000 per month plus additional money depending upon the amount of cargo handled. (25:55-57). Teitlebaum gave Williams \$400 up front, but Williams indicated he wanted \$500. Teitlebaum responded that he would receive the additional \$100, along with the first \$1,000 monthly payoff, when they met in Jacksonville. (25:80-81).
- (3) At the same meeting, Teitlebaum attempted to discuss the 1975 cruise tickets, but Williams cut him off, stating that it was too easy for someone to "bug" an automobile. (25:81).
- (4) Shortly after Teitlebaum met with Williams in Miami, he travelled to Jacksonville and paid Williams \$1,100, using money supplied by the FBI. (25:96).

(5) In 1975, co-defendant Joseph Cotrone received an offer from PRMMI to perform the company's maintenance and repair work at the port of Jacksonville. Barone told Cotrone it would be necessary to give Williams \$3,000 in order for Cotrone to get an introduction into the Jacksonville area. (60:42). The Cotrones eventually formed a new company in Jacksonville and began paying Williams 25 cents for each hour worked by Cotrone's Jacksonville employees. That formula was later abandoned in favor of a flat \$1,000 per month. (63:26-27, 39-45; 64:141, 172-203).

(6) Williams presided over the meeting at which Ramon DeMott and James Hodges attempted to negotiate a union contract in Savannah. When DeMott and Hodges sought to make certain changes in the contract, Williams warned them that people who gained disfavor with the union "wound up on their backs in bed and their arms and legs in traction, sipping soup through a straw and thinking about the follies of their ways." (11:72).

While the major portion of Williams' argument relating to the sufficiency of the evidence consists of a general attack upon the credibility of the witnesses who testified against him, he focuses particular attention upon Count 9 of the indictment. Count 9 charged that Williams solicited and received cruise tickets from Teitlebaum in or about May 1975, in violation of Section 186 of the Taft-Hartley Act. Williams, testifying at trial, admitted receiving the tickets, but claimed he paid Boyle for them. Boyle did not testify.

Williams argues that the jury could not have reasonably returned a guilty verdict on Count 9 in light of his uncontradicted testimony that he paid Boyle for the tickets. The government argues that the jury was free to

reject Williams' testimony as not being credible, pointing out that there was contradictory testimony concerning the ticket transaction. Williams testified that he paid Boyle for the tickets while at a union meeting in Charleston, South Carolina. He further testified that he received the tickets at the time of payment and that he personally delivered them to the mayor's office upon his return to Jacksonville.³⁸ (81:53-55). The mayor, on the other hand, testified that Williams told him the tickets could be picked up in Miami and the mayor's son testified that that was in fact where he picked them up. (34:164-165; 88:149-150).

Teitlebaum's testimony concerning his initial meeting with Williams cast further doubt upon the truthfulness of Williams' version of the facts. When Teitlebaum attempted to discuss the cruise tickets he had obtained for Williams, Williams cut him short, stating that he did not want to discuss the matter in an automobile because cars were too easy to bug. (25:81). Surely, had Williams actually paid Boyle the full value of the tickets he would have had no reason to fear that a discussion of the incident was being surreptitiously overheard.

The fact that Teitlebaum was never reimbursed for the cost of the tickets, combined with Williams' contradictory testimony and his reluctance to discuss the ticket transaction for fear of being electronically surveilled, was sufficient to allow the jury to infer that Williams never in fact paid for the tickets. The evidence was sufficient to convict Williams on Counts 1, 2, 9 and 15.

³⁸ As noted in the facts section of this opinion, *supra*, Williams apparently acquired the tickets on behalf of the mayor of Jacksonville, who gave them to his son as a wedding present.

Morales, R Kopituk, D. Kopituk

Appellant Morales was convicted of the two RICO charges (Counts 1 and 2), two Taft-Hartley charges (Counts 44 and 46), and two income tax charges (Counts 68 and 70). Raymond Kopituk was convicted of the two RICO charges, the same two income tax charges, and one Taft-Hartley charge (Count 44). Dorothy Kopituk was not charged in the substantive RICO count and was acquitted on the RICO conspiracy count. She was convicted of two income tax charges (Counts 68 and 69) and one Taft-Hartley charge (Count 44). Together, they challenge the sufficiency of the evidence as to all counts upon which they were convicted.

Morales and Kopituk contend that the evidence was insufficient to support their convictions on either RICO count. In the final analysis, however, their argument boils down to another ill-fated attack upon the credibility of the witnesses who testified against them.

With respect to the RICO substantive count, the government produced sufficient evidence to prove the existence of the enterprise,³⁹ that Morales and Kopituk

³⁹ Morales and Kopituk apparently contend that the evidence was insufficient to prove the existence of an "enterprise," an essential element of the RICO substantive offense charged herein. This contention is wholly without merit. The RICO statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . ." 18 U.S.C. § 1961(4). Count 2 of the indictment charged that the appellants and others "associated with an enterprise . . . to corruptly control and influence the waterfront industry of various ports in the United States . . . through a pattern of racketeering activity." The evidence adduced at trial overwhelmingly established the existence of an extensive, well-defined criminal enterprise dedicated to achieving economic control of several major ports in the

[footnote continued]

were associated with the enterprise, and that Morales and Kopituk participated in the affairs of the enterprise through a pattern of racketeering activity. *United States v. Martino, supra*, 648 F.2d at 394. With respect to the RICO conspiracy count, the evidence was sufficient to allow the jury to reasonably find that Morales and Kopituk agreed to participate, either directly or indirectly, in the affairs of the enterprise through the commission of two or more predicate crimes. *United States v. Elliott, supra*. 571 F.2d at 903.

At the trial below, Morales and Kopituk attempted to establish their innocence by denying all participation in the criminal enterprise. While they adhere to that position on appeal, they apparently make the further contention that, assuming the evidence was sufficient to establish their participation in the enterprise, such participation resulted solely from coercion exerted upon them by union officials. In other words, Morales and Kopituk attempt to adopt a position similar to that taken by co-defendant Harrington at trial, i.e., that they were unwilling victims of the criminal enterprise who were coerced into making illegal payoffs under the threat of economic ruin. The evidence adduced at trial, however, was clearly sufficient to establish that Morales and Kopituk sought out the union officials and willingly agreed to make payoffs in return for lucrative waterfront business. Viewing the evidence in the light most favorable to the government, it showed that:

(1) In 1972, Morales and Kopituk sought out George Wagner in an effort to obtain a union contract to engage in container and trailer repair work at the Dodge Island Seaport. (43:119-120). Wagner discussed the matter with Barone, Boyle and Vanderwyde, and it was agreed that Morales and Kopituk could acquire a union contract

for an initial payment of \$10,000 and \$1,000 each month thereafter. (43:120-121). Wagner, however, told Morales and Kopituk that it would cost \$15,000 up front, intending to keep the extra \$5,000 for himself. Morales and Kopituk readily agreed to the payoffs. (43:122).

(2) Shortly thereafter, Morales and Kopituk met with Wagner and paid him the \$15,000. (43:126). Wagner subsequently began sending business from MTI to Florida Welding Services Corp., the company operated by Morales and Kopituk.⁴⁰ (43:135).

(3) In 1973, Wagner began receiving the \$1,000 monthly payoffs from Morales and Kopituk, which he delivered alternately to Boyle, Barone or Vanderwyde. (43:156). The government established the probable method through which FWS generated cash for the

Southeastern United States. In *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981), the Supreme Court observed that "[t]here is no restriction upon the associations embraced by the definition [of enterprise]: an enterprise includes any union or group of individuals associated in fact." 452 U.S. at 580, 101 S. Ct. at 2527, 69 L. Ed. 2d at 253. Without question, the enterprise charged in the indictment, the existence of which was proved at trial, fell within the broad definition of enterprise encompassed by the RICO Act.

⁴⁰ Not only did FWS receive lucrative waterfront business as a direct result of their illegal payoffs, they were even able to recoup a substantial portion of the payoff money itself. Wagner testified that he prepared inflated invoices on behalf of FWS that were paid by MTI in order to allow Morales and Kopituk to offset their initial payoffs to the union. (43:124, 138, 151-152). This fact further diminishes the claim of Morales and Kopituk that no business would want "to promote and be a part of an organization that required these payments in exchange for the opportunity to run a legitimate business." Brief for Appellants Morales, R. Kopituk and D. Kopituk at 54.

payoffs by producing several witnesses who testified that, at the request of Morales or Kopituk, they cashed FWS checks designating them as payees and returned the cash to either Morales or the Kopituks.

(4) In January 1975, Morales and Kopituk contacted Wagner about acquiring a second union contract to enable them to expand their operation. Wagner assented to the initiative and told Morales and Kopituk that it would cost them another \$15,000 up front. They gave Wagner a \$5,000 installment which he kept, unbeknownst to the union officials. (43:173-176). Morales and Kopituk later complained to Barone about the fact that "they were not getting any service from . . . [Wagner] and that they were going to discontinue paying if they did not get some more attention from the union." (44:35).

(5) In mid-1973, Morales approached Wagner about the possibility of securing some waterfront business on behalf of a friend of his who operated a trucking company. Wagner discussed the proposal with Barone, who gave his approval. Wagner contacted Morales and explained that his friend, Jeronimo Acosta, could obtain the union contract for \$15,000, that \$10,000 of that amount would go to the union, and that he and Morales would split the remaining \$5,000. (44:45). Morales agreed and the deal was transacted in that manner.

(6) In June 1975, Ramon DeMott and James Hodges discovered that it would be necessary for them to obtain a union contract in order to continue operating their container repair business in Savannah. They contacted Morales and arranged to meet. When DeMott and Hodges subsequently met with Morales and Kopituk in Savannah, Morales told them that it would cost anywhere from \$5,000 to \$15,000 to acquire a union contract. (11:44; 13:48). Kopituk agreed with Morales' estimate. (11:45;

13:48). Shortly after Morales and Kopituk departed, DeMott and Hodges received a telephone call from Boyle, who requested a meeting with them. (11:46; 13:48-49). When DeMott and Hodges arrived at Boyle's Savannah office, Morales and Kopituk were already there. (11:46; 13:50). Morales and Kopituk left and Boyle made the payoff arrangements which ultimately led to DeMott and Hodges entering into a union contract. (11:45; 13:52).

The response of Morales and Kopituk to the evidence summarized above is that the witnesses were not telling the truth. There were, in fact, some inconsistencies in the testimony of the witnesses. The discrepancies, however, related to more or less extraneous facts, rather than to the substance of the illegal transactions. In other words, while the testimony of some witnesses differed as to events that led up to or occurred during the illegal transactions, the testimony was consistent as to the issues central to the jury's verdicts, i.e., that the illegal transactions did in fact transpire. Moreover, as noted *supra*, conflicts in the testimony were for the jurors to resolve, based upon their collective evaluation of the respective witnesses' credibility.

The evidence demonstrated that Morales and Kopituk knowingly and voluntarily associated themselves with the criminal enterprise and participated in its affairs through a pattern of racketeering activity. Similarly, the evidence demonstrated that Morales and Kopituk had conspired to participate in the affairs of the enterprise through the commission of two or more predicate crimes. Thus, the evidence was sufficient to support their convictions on both the RICO substantive and conspiracy charges.

Morales, Raymond Kopituk and Dorothy Kopituk were all convicted on Count 44, which charged them with making the \$1,000 monthly payments to the Miami

union officials. The testimony of George Wagner provided sufficient evidence to support the jury's verdict on that count. As outlined above, Wagner regularly received the \$1,000 payments from either Morales or Raymond Kopituk, which he then delivered to either Boyle, Barone or Vanderwyde.

Moreover, Wagner testified that on two occasions he received the payment directly from Dorothy Kopituk. His testimony regarding one of those transactions served to demonstrate Mrs. Kopituk's knowing participation in the payoff scheme. Wagner testified that, on the occasion in question, he visited the offices of FWS to collect the \$1,000 monthly payment. Raymond Kopituk explained that they were having problems generating enough cash to satisfy the payments and asked if Wagner would accept a check. Wagner said that he would and Dorothy Kopituk asked him how she should record the check. Wagner told her it did not matter to him and that as far as he was concerned she could write "Happy Birthday." She asked him if "consulting fee" would be acceptable and he said that would be fine, so she proceeded to record the check in that manner. (44:22-24).

Wagner's testimony, along with that of Jeronimo Acosta and George Medina, also furnished sufficient evidence to support Morales' conviction on Count 46, which charged him with aiding and abetting Boyle's receipt of \$10,000 on behalf of Jasca Transfer, Inc. In return for the \$10,000, Jasca Transfer was awarded a union contract to perform trucking work at the port of Miami.

Morales, Raymond Kopituk and Dorothy Kopituk all challenge the sufficiency of the evidence supporting their convictions on the income tax counts. Those counts charged that Morales and the Kopituks knowingly assisted in the preparation of (and, in the case of Dorothy

Kopituk in Count 69, knowingly made and subscribed to) income tax returns for the 1974 and 1975 fiscal years that claimed false deductions. The government's evidence showed that many amounts claimed as legitimate business expenses actually constituted illegal payoffs to union officials.

Specifically, the tax counts on which Morales and the Kopituks were convicted charged that: (1) for the fiscal year ending March 31, 1974, Morales and both Kopituks assisted in the preparation of a fraudulent tax return on behalf of FWS (Count 68); (2) for the fiscal year ending March 31, 1975, Dorothy Kopituk made and subscribed a false tax return on behalf of FWS (Count 69); and (3) for the fiscal year ending March 31, 1975, Morales and Raymond Kopituk assisted in the preparation of a false tax return on behalf of FWS (Count 70). The defense to these charges was that, with respect to Counts 68 and 70, the appellants never examined or signed the tax returns and, with respect to Count 69, that Dorothy Kopituk, although signing the return, never examined it. Appellants press this same argument on appeal.

The evidence, however, was sufficient to support their convictions on the tax counts even if appellants' testimony that they never examined the returns is accepted as true (which, of course, the jury was not required to do). Appellants rely upon the fact that it was their accountant, rather than themselves, who actually prepared the returns, yet they do not contest that the returns were prepared with reference to the corporate records they compiled. Since the tax returns were prepared in reliance upon the information supplied by appellants, they were chargeable with knowledge of the content of those returns regardless of the fact that they did not actually fill out the tax forms. *See United States*

v. Cramer, 447 F.2d 210, 219 (2d Cir. 1971), cert. denied, 404 U.S. 1024, 92 S. Ct. 680, 30 L. Ed. 2d 674 (1972); *United States v. Maius*, 378 F.2d 716, 718 (6th Cir.), cert. denied, 389 U.S. 905, 88 S. Ct. 216, 19 L. Ed. 2d 219 (1967).

Those records fraudulently designated amounts used to pay off union officials as expenses for "commissions," "repairs" and other items. The fact that appellants did not examine or sign the returns is not a determinative factor. See *United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978). The evidence was sufficient for the jury to find Morales and the Kopituk's guilty of the tax charges.

D. Admission of Field's Conviction

Appellant Field argues that it was error for the trial court to admit evidence of his prior conviction on federal racketeering charges.⁴¹ In 1977, Field was convicted in the Southern District of New York on RICO and Taft-Hartley charges for unlawfully demanding and receiving payments from employers while serving as General Organizer of the ILA.

As with many other issues involved in this appeal, our standard of review in considering the propriety of the district court's decision to admit the evidence of Field's prior conviction is limited to a search for abuse of discretion. *United States v. Bulman*, 667 F.2d 1374, 1382 (11th Cir. 1982); *United States v. McMahon*, 592 F.2d 871, 873 (5th Cir.), cert. denied, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289 (1979). Our analysis proceeds

⁴¹ Appellant Turner also raises this issue, claiming that all of Field's co-defendants were prejudiced by the admission of Field's prior conviction.

under the guidance of *Fed. R. Evid.* 404(b) and the decision engendered in *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979).

Rule 404(b) provides that evidence of other crimes is not admissible to prove the bad character of a person, but is admissible for a variety of other purposes, such as to show intent, motive, opportunity, preparation, or the absence of mistake. In *Beechum*, the former Fifth Circuit Court of Appeals, sitting en banc, set out a two-part test for determining the admissibility of extrinsic offense evidence under Rule 404(b): "First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403." 582 F.2d at 911.⁴²

Similarity of the extrinsic offense to the offense charged is the standard by which relevancy is measured under Rule 404(b). In the context of a claim that the extrinsic offense is relevant to the issue of intent, as is the case herein, relevancy is determined by comparing the state of mind of the defendant in perpetrating the respective offenses. A finding that the offenses involved the same state of mind renders the extrinsic offense relevant to an issue other than character because it lessens the likelihood that the defendant acted with lawful intent in connection with the charged offense. 582 F.2d at 911.

⁴² As a threshold matter, the trial court must determine whether the government has produced sufficient evidence to support a finding that the defendant did in fact commit the extrinsic offense. *United States v. Beechum, supra*, 582 F.2d at 913. Since Field was convicted of the extrinsic offense at issue herein, this matter was never at issue.

The similarity and, hence, relevancy of Field's extrinsic offenses to the offenses charged below is undeniable. The charges in both cases involved Field using his position as a union official to extort or otherwise demand and receive money and other articles of value from employers. The state of mind inherent in the commission of such nearly identical offenses would necessarily be the same. As such, the first portion of the *Beechum* test was clearly satisfied.

The next question is whether the probative value of the extrinsic offense evidence was substantially outweighed by the danger of unfair prejudice. This second part of the *Beechum* test requires application of a heightened test of relevance with reference to the posture of the case at the time the government seeks to admit the extrinsic offense evidence. If the issue of intent is contested and the government lacks other strong evidence of intent, then the extrinsic offense evidence will likely possess great probative value, sufficient to outweigh any danger of unfair prejudice. On the other hand, if the defendant's intent is uncontested, "then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice" and the evidence should be excluded. 582 F.2d at 914.

Field contends that this latter principle was applicable to the trial below and mandated exclusion of the evidence relating to his prior conviction. He argues that since he denied any and all participation in the offenses charged, his intent was never placed in issue. While other courts have held that denial of participation in the acts charged does not place the defendant's intent at issue, e.g., *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978), the law in this circuit is that, in the context of a *conspiracy* case, the mere entry of a not guilty plea

sufficiently raises the issue of intent to justify the admissibility of extrinsic offense evidence.

In *United States v. Roberts*, 619 F.2d 379 (5th Cir. 1980), it was held that:

[i]n every conspiracy case . . . a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he "affirmatively take[s] the issue of intent out of the case."

619 F.2d at 383, quoting *United States v. Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868, 99 S. Ct. 196, 58 L. Ed. 2d 179 (1978); accord, *United States v. Bulman*, *supra*, 667 F.2d at 1382; *United States v. Renteria*, 625 F.2d 1279, 1282 (5th Cir. 1980). The decision in *Roberts* was based upon the unique difficulty of proving intent in a conspiracy case, where it must be shown that the defendant knowingly joined in a scheme to commit a crime or a series of crimes and not simply that he committed a particular criminal act or that he associated with other conspirators. The court took special cognizance of the particularly onerous burden involved in attempting to prove the intent of a defendant who was a "passive" member of the conspiracy. 619 F.2d at 383.

The rule enunciated in *Roberts*, that entry of a not guilty plea in a conspiracy case suffices in and of itself to render the defendant's intent a material issue, is not an exception to the rationale of *Beechum*. Rather, it is an extension of that rationale. *Beechum* merely held that where a defendant's intent is uncontested or where the government's other proof of intent is strong, the extrinsic offense is unnecessary to the government's case and, therefore, lacks any real probative value. As such,

the danger of unfair prejudice overshadows the probative value of the evidence and justifies its exclusion. The *Roberts* decision adhered to that principle but, recognizing the difficulty of proving intent in a conspiracy case, held that intent is virtually always at issue in such cases and that extrinsic offense evidence is thus highly probative when it bears on that issue. Only when the defendant "affirmatively takes the issue of intent out of the case,"⁴³ is he entitled to exclusion of the evidence. 619 F.2d at 383.⁴⁴

In the instant case, Field was, of course, charged with conspiracy. The government's evidence of Field's intent to participate in the conspiracy was not strong. Indeed, it appears that, while Field's role in the conspiracy was substantial, he was one of those "passive" or insulated participants alluded to in *Roberts*. Much of the proof bearing on Field's intent was arguably susceptible to innocent interpretation. For example, counsel for Field attempted to establish through the cross-examination of Ramon DeMott that Field's statement, "Don't expect something for nothing," was devoid of any ominous meaning, suggesting that, "It could have meant anything, couldn't it?" (12:138).

In short, the evidence of Field's prior conviction was highly probative of Field's intent and outweighed any

⁴³ The *Roberts* court noted that a defendant can withdraw the issue of intent from a case by denying participation in the acts charged, but stipulate that those acts prove intent if it is in fact shown that he committed the acts. 619 F.2d at 383 n.2.

⁴⁴ Of course, even under *Roberts*, the government must always establish, as a predicate to admissibility of the extrinsic offense evidence, that the defendant committed the extrinsic offense and that the extrinsic offense was perpetrated with the same state of mind as the charged offense.

possible prejudice he or his co-defendants suffered from its admission into evidence. This was particularly true in light of the lengthy limiting instruction read to the jury immediately after admission of the evidence⁴⁵ which repeatedly emphasized: that the evidence of Field's prior conviction could not be considered as evidence that Field committed the acts charged in the indictment below; that the evidence could not be considered for any purpose whatsoever unless the jury first found that the other evidence established beyond a reasonable doubt that Field committed the acts charged in the indictment; that if the jury found beyond a reasonable doubt that Field committed the acts charged in the indictment then it could consider the extrinsic offense evidence only in determining Field's state of mind in committing those acts; and that the evidence did not in any way relate to any of the other defendants in the case and could not be considered as relating to any other defendant. (71:207-210).

Because the evidence of Field's prior conviction was relevant to Field's intent and because its probative value outweighed any danger of unfair prejudice to Field or his co-defendants, the trial court did not abuse its discretion in admitting the evidence.

E. Cross-examination of Teitlebaum

Appellants Williams and Vanderwyde maintain that the trial court improperly limited the scope of their cross-examination of Joseph Teitlebaum, the principle government witness. As noted *supra*, Teitlebaum was

⁴⁵ The evidence of Field's prior conviction was limited to admission of a copy of the Judgment & Commitment Order entered in the case.

arrested in 1975 on state charges for his participation in a plot to kill a business associate in South America. In return for his agreement to cooperate with the government in connection with this case, Teitlebaum was permitted to plead guilty to a misdemeanor charge and the other charges were dropped.

At trial, appellants were permitted to elicit the following information from Teitlebaum during cross-examination concerning the state charges: (1) that in 1975 he was charged by the state of Florida with solicitation to commit murder, conspiracy to commit murder and attempted murder; (2) that he faced a maximum exposure of 21 years in prison; (3) that in return for his agreement to testify for the government in this cause he was permitted to plead to the misdemeanor charge of solicitation to commit murder; and (4) that pursuant to that plea arrangement, he received a sentence of one year probation and the other charges against him were dropped. (31:34-37).

Nevertheless, despite the wide latitude of inquiry accorded by the trial court regarding these charges, appellants contend the court committed reversible error in prohibiting questions relating to the method in which the contract killing arranged by Teitlebaum was to be executed—with an ice pick. Appellants claim this limitation on the scope of their cross-examination of Teitlebaum contravened their Sixth Amendment right to confront the witnesses against them.

Williams and Vanderwyde cite a litany of cases holding that the confrontation clause bestows upon a defendant the right to cross-examine a prosecution witness as to any possible biases, prejudices or ulterior motives that bear upon his testimony. The cases make it clear that “the exposure of a witness’ motivation in testifying is

a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974), and that "cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope." *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974), quoting *McDonnell v. United States*, 393 F.2d 404, 406 (5th Cir. 1968).

As was observed in *United States v. Mayer*, 556 F.2d 245 (5th Cir. 1977), wide latitude in exploring a witness' motivation for testifying is particularly necessary where:

a prosecution witness has had prior dealings with the prosecution or with other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecution in exchange for the prosecutor's actions in having some or all of the charges against the witness dropped, [citing case], securing immunity against prosecution for the witness, [citing case], or attempting to assure that the witness receives lenient treatment in sentencing, [citing case].

556 F.2d at 248-249. This observation was particularly applicable to the trial below where Teitlebaum, who had previously entered into an agreement with prosecutors whereby he would testify in return for a favorable plea package in connection with the state charges against him, was unquestionably the government's most vital witness. The flaw in appellants' claim, however, is that their rights under the confrontation clause were more than adequately protected by the leeway accorded to them by the trial court in conducting their cross-examination of Teitlebaum. The trial court allowed appellants to elicit all pertinent information concerning Teitlebaum's prior conviction and its bearing upon his decision to cooperate with the government.

The claim that the method of killing that was to be employed in executing the murder contract (i.e., attack with an ice pick) was critical to appellants' efforts to discredit Teitlebaum's testimony lacks any persuasive merit. As the trial judge aptly noted, the fact that death was to be effectuated through a "pill or a gun or an ice pick" did not in any way impact upon Teitlebaum's credibility. (26:220). The critical point, which the trial court correctly permitted to be brought out before the jury, was that Teitlebaum had arrived at an agreement with the government whereby he would testify in the instant matter in return for a lenient plea agreement in connection with his state charges.

A defendant's right to cross-examine witnesses against him is not absolute. The information sought to be elicited must be relevant. *Greene v. Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981); *United States v. Love*, 599 F.2d 107, 108 (5th Cir.), cert. denied, 444 U.S. 944, 100 S. Ct. 302, 62 L. Ed. 2d 312 (1979). Once cross-examination has been permitted to an extent sufficient to satisfy the defendant's Sixth Amendment rights, the trial judge's discretionary authority comes into play. *Greene v. Wainwright*, *supra*, 634 F.2d at 275; *United States v. Mayer*, *supra*, 556 F.2d at 250; *United States v. Bass*, 490 F.2d 846, 858 n.12 (5th Cir. 1974).

In the case *sub judice*, the trial court, after allowing appellants to cross-examine Teitlebaum to the full extent necessary to explore his motives for testifying, properly exercised its discretionary authority to prohibit questioning as to the proposed method of killing. Such questioning would have added nothing to the appellants' legitimate interests in impeaching Teitlebaum's credibility. Rather, as the trial court found, testimony on this matter would have served only to inflame the jurors

and divert their attention from the real issues in the case.⁴⁶

Appellants exhaustively cross-examined Teitlebaum for five full days. They were permitted to pursue every possible course of questioning designed to discredit his testimony including his underlying motives, inconsistencies between his trial testimony and his prior statements, and his own participation in the criminal enterprise. References to Teitlebaum's 1975 arrest were made at several points during the cross-examination. In short, appellants were accorded a full, fair opportunity, which they took advantage of, to cross-examine Teitlebaum as to every material matter.

F. *Brady* Violations?

Appellants Vanderwyde and Williams contend that they were denied due process of law by the prosecutors' actions in failing to disclose allegedly exculpatory information to them, in violation of the rule enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The *Brady* doctrine holds that "suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is

⁴⁶ Appellant Vanderwyde argues that the "ice pick" evidence was necessary to dispel the jurors' impression that Teitlebaum was an innocent, gentle man who was intimidated into participating in the criminal enterprise. A reading of the transcript of Teitlebaum's testimony, however, does not convey any such impression, for his testimony clearly established his own complicity in the criminal enterprise. Moreover, while the jury may not have been apprised of the method of killing, they were well aware that Teitlebaum sought to hire someone to murder a business associate. Surely that was sufficient to dissipate any notion that he was a gentle, timid person.

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196.

Appellants' central *Brady* claim revolves around a conflict in the testimony of two government witnesses, Jeronimo Acosta and George Medina, who were business partners in the Miami-based trucking company, Jasca Transfer, Inc. Acosta testified that he paid \$15,000 to the Miami union officials to acquire a union contract to operate his trucking business at the Dodge Island Seaport. Business went very well for a few months after Acosta entered into the contract, but then began to decline. Dismayed at the small amount of business that was being parceled out to Jasca Transfer, Acosta complained to George Wagner and demanded to meet with Boyle and Barone. When Boyle, Barone and Wagner visited Acosta's office the next day, Acosta reiterated his complaints and threatened to expose the criminal enterprise to the FBI and the media unless the union officials took action to solve his "problem." Barone's response to Acosta's threat was, according to Acosta, a counter-threat against Acosta's life. Acosta testified that his partner, George Medina, was present at and participated in the discussion.

Medina had testified earlier in the trial. While his testimony corroborated Acosta's as to many material matters, it differed as to many details. Medina was not questioned about the meeting at which Barone allegedly threatened Acosta.

Immediately prior to appellants' cross-examination of Acosta, one of the government attorneys discovered that he had inadvertently failed to include a transcript of Acosta's testimony taken at one of his appearances before the grand jury in a package of Jencks Act mate-

rials delivered to defendants.⁴⁷ The omitted transcript contained Acosta's assertion that Medina was present

⁴⁷ It appears clear from perusal of the record that the government's failure to furnish appellants with copies of Acosta's grand jury testimony at an earlier date was indeed inadvertent. Following a recital by one of the defense attorneys of his version of how the events transpired, the following exchange occurred:

THE COURT: I don't think that is quite how it happened. It developed yesterday morning when Mr. Evans [co-counsel for the government] was looking over somebody's shoulder at what he had, and he said, 'You don't have, apparently, something that I do have,' and Mr. Rosen [counsel for appellant Barone] joined in and said, 'Well, I don't have it, either,' and then produced this other grand jury testimony.

Now, I do remember that correctly or incorrectly?

MR. MASIN [counsel for appellant Boyle]: I don't recall it like that.

MR. EVANS: That is how I recall it. Your Honor, I went to look and see what Mr. Martinez [co-counsel for appellants R. Kopituk, D. Kopituk and Morales] had marked because I was attempting to figure out some sort of stipulation as to whether Acosta had said something or not in an interview or prior grand jury testimony.

THE COURT: That is my recollection of how it developed, and then at one point he produced and Mr. Rosen immediately began to review grand jury testimony, after which he had it copied and distributed to all parties. I don't think anybody was testifying at the time.

(51:114-115). It appears, therefore, that no prosecutorial misconduct was involved in the delayed delivery of Acosta's grand jury transcript. One must remember that the transcript at issue pertained to only one of Acosta's many grand jury appearances.

A finding of inadvertent error would not impact upon a valid *Brady* claim because the Supreme Court expressly held in *Brady* that nondisclosure of exculpatory material violates due process "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S. Ct. at 1196. In the instant case, however, it is probable that the government's delivery of Acosta's grand jury transcript, while untimely as compared with the government's practice to furnish such materials well in advance of the witness'

[footnote continued]

when Barone threatened Acosta, a claim concerning which Acosta testified at trial but which was not referred to in any of the materials delivered to defendants prior to Medina's appearance at trial. Appellants subsequently obtained an affidavit from Medina setting forth that he had no knowledge of the discussion in which Barone threatened Acosta and that he had informed the government attorneys of that fact prior to testifying.

Accordingly, appellants moved the district court to either dismiss the indictment or declare a mistrial, contending that the prosecutors' actions in failing to timely deliver a copy of Acosta's grand jury testimony and in failing to inform them of Medina's claim that he

appearance at trial, did not constitute a violation of the *Brady* doctrine. The Jencks Act, 18 U.S.C. § 3500, provides that in any criminal prosecution brought by the United States, no statement or report of a government witness need be produced to a defendant until after completion of the witness' direct testimony at trial. 18 U.S.C. § 3500(a). While a transcription of a witness' grand jury testimony is included within the definition of "statement" in 18 U.S.C. § 3500(e)(3), courts have uniformly adhered to the strictures of Section 3500(a) in holding that disclosure of a witness' grand jury testimony need not be made until after the witness has testified on direct examination. See *United States v. Rivero*, 532 F.2d 450, 461 (5th Cir. 1976); *United States v. Pelton*, 578 F.2d 701, 709 (8th Cir.), cert. denied, 439 U.S. 964, 99 S. Ct. 451, 58 L. Ed. 422 (1978); *United States v. Wilkinson*, 513 F.2d 227, 232 (7th Cir. 1975). The government produced the grand jury transcript at issue herein after Acosta testified and before any of the appellants had cross-examined him. Thus, with respect to appellants, there was no violation of the Jencks Act. It has been held that "when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act." *United States v. Martino*, *supra*, 648 F.2d at 384, quoting *United States v. Anderson*, 574 F.2d 1347, 1352 (5th Cir. 1978). Consequently, in light of the foregoing, it appears that the alleged *Brady* violation concerning the transcript of Acosta's grand jury testimony was not only inadvertent, but in all likelihood nonexistent.

never witnessed Barone threatening Acosta constituted violations of the *Brady* doctrine. Prejudice resulted, appellants claimed, from the fact that they were deprived of an opportunity to discredit Acosta's testimony regarding the death threat by showing, through cross-examination of Medina, that Acosta was lying as to other details surrounding the conversation; namely, that Medina was present and participated in the discussion.

The trial court denied appellants' motions but, finding that the undisclosed information came "sufficiently close" to constituting *Brady* material, allowed Medina to be recalled as a government witness. On their renewed cross-examination of Medina, appellants elicited his claim that, contrary to Acosta's assertions, he had no knowledge of the discussion wherein Barone threatened Acosta's life.⁴⁸ The trial court refused, however, to permit any questions bearing on the prosecutors' alleged misconduct, that is, Medina was not permitted to testify to the fact that he had previously told the government attorneys that he had no knowledge of the meeting described by Acosta.

On appeal, appellants challenge the denial of their respective motions to dismiss the indictment or to declare a mistrial and argue further that the trial court erred in prohibiting them from questioning Medina as to his statements to the government attorneys.

⁴⁸ The impact of the discrepancy between the testimony of Acosta and that of Medina regarding this discussion was not as great as appellants contend, for as the government notes in its brief, Medina had previously testified that Barone did in fact threaten Acosta's life, albeit in a different context. Medina stated that Barone once visited his office and complained about the fact that Acosta was using Barone's name to procure business on the waterfront. According to Medina's testimony, Barone told him that if Acosta continued to do so, "he . . . [was] the one that . . . [was] going to be missing." (48:79).

A defendant seeking to show a breach of the *Brady* doctrine warranting reversal of his conviction must establish three facts: (1) that the prosecution suppressed evidence; (2) that the evidence bore favorably on the defendant's defense; and (3) that the evidence was material to the question of guilt or innocence. *Moore v. Illinois*, 408 U.S. 786, 794-795, 92 S. Ct. 2562, 2567-68, 33 L. Ed. 2d 706 (1972); *United States v. Anderson*, *supra*, 574 F.2d at 1353. While we believe appellants have failed to meet this tripartite standard, it is unnecessary to explore the question in detail, for we find that the actions of the trial court in recalling Medina as a witness operated to erase any potential prejudice appellants might otherwise have suffered as a consequence of the government's omissions.

Clearly, the circumstances at the trial below did not resemble the typical situation giving rise to a *Brady* claim. As the Supreme Court observed in *United States v. Agurs*, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the context in which *Brady* claims are generally raised "involves the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103, 96 S. Ct. at 2397 (emphasis added).

In considering whether the government's nondisclosure of exculpatory information operated to deny a federal defendant his right to due process of law guaranteed by the Fifth Amendment, the focus is not upon the fact of nondisclosure, but upon the impact of the nondisclosure on the jury's verdict. See *United States v. Anderson*, *supra*, 574 F.2d at 1356. As was stated in *United States v. Agurs*, *supra*, no denial of due process occurs "unless the omission deprived the defendant of a fair trial . . ." 427 U.S. at 108, 96 S. Ct. at 2399-2400.

At the trial below, the government's omissions had no impact upon the jury's verdicts because the omissions were discovered during trial, rather than after trial, thereby enabling the trial court to take action to remedy the effect the omissions might otherwise have had. Allowing Medina to be recalled as a government witness afforded appellants the opportunity to fully exploit the inconsistencies between the respective testimony of Medina and Acosta, and it is clear that the entire thrust of appellants' *Brady* argument at the trial below was founded upon the fact that they were initially deprived of such an opportunity.⁴⁹ Consequently, since the omissions in no way impacted upon the jury's verdicts, appellants have no basis to claim they were denied a fair trial.

Appellants' claim that they should have been permitted to elicit Medina's testimony, in the presence of the jury, relating to his prior oral statements to the government attorneys similarly lacks merit. The theory behind this argument is that appellants should have been permitted to expose to the jury, through Medina's testimony, what they perceived to be prosecutorial misconduct in intentionally concealing evidence favorable

⁴⁹ The following exchange is indicative of this observation:

THE COURT: Well, back to my point, is the reason you classify it as *Brady* material and claim that it should have been provided you early is so you could have prepared and, more specifically, to examine Mr. Medina on the question of whether or not, in fact, a meeting which you knew was going to be testified about ever took place, and you could have covered him in advance?

MR. LIEB [counsel for Morales, R. Kopituk, D. Kopituk]:
Yes, sir.

(51:118).

to their defense. Appellants failed to convince the trial court, however, that any intentional prosecutorial misconduct necessarily occurred. That fact combined with the fact that the testimony lacked any real relevance to the issues in the case moved the district court to reject appellants' argument on this point. The court ruled that, under *Fed. R. Evid.* 403, the probative value of Medina's testimony as to what he told the government attorneys was outweighed by its potential for misleading the jury.

In considering appellants' claim, it is significant to first note what is not involved. Contrary to appellants' assertions at trial, this is not a case where the government intentionally produced perjured testimony. The government attorneys explained to the trial court that they did not attach great significance to Medina's conflicting version of the facts because they simply accepted it as another of many discrepancies between the testimony of Acosta and Medina.

At trial, the prosecutors argued that it was not their burden to develop appellants' case and, in fact, the law supports the proposition that where information is otherwise available to a defendant, "[t]ruth, justice, and the American way do not . . . require the Government to discover and develop the defendant's entire defense." *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980). Since the prosecutors believed they had already provided appellants with a transcript of Acosta's grand jury testimony containing Acosta's assertion that Medina was present when Barone threatened to kill Acosta, they apparently did not feel it was necessary to relate the content of Medina's oral statements to appellants. While perhaps it would have been more desirable for the prosecution to have erred on the side of caution, we are unable to conclude that there was any egregious prosecutorial

misconduct at the trial below. Consequently, we cannot say that the trial court abused its discretion in determining that the probative value of Medina's testimony bearing on the alleged prosecutorial misconduct was outweighed by the considerations enumerated in Rule 403.

Appellant Williams sets forth a sundry list of other *Brady* violations purported to have occurred at trial, none of which warrant detailed discussion. Suffice it to say that none of the claims rise to the level of *Brady* violations because the evidence underlying the individual claims was either non-exculpatory in nature or was not sufficiently material to warrant reversal of Williams' conviction.⁵⁰ Moreover, like the claim involving Acosta and Medina, all of Williams' *Brady* claims involve mere delays in the transmittal of information or materials to the appellants and not outright omissions that remained undiscovered until after trial. Accordingly, since Williams was able to fully and effectively utilize the information or materials, he was not deprived of a fair trial.

G. The Prosecutor's Closing Argument

Appellant Field challenges the propriety of the prosecutor's closing argument on two grounds. First, he argues that the prosecutor improperly expressed his personal opinion in commenting upon Field's role in the conspiracy and suggested to the jury that there was evidence other than that produced at trial that proved Field's guilt. Second, Field argues that the prosecutor

⁵⁰ To be of sufficient materiality to mandate reversal of a conviction the omitted evidence must create a reasonable doubt that otherwise would not exist. *United States v. Agurs*, *supra*, 427 U.S. at 112, 96 S. Ct. at 2401.

improperly suggested to the jurors that they had a personal stake in the outcome of the case.

Our central inquiry in reviewing a claim of misconduct in connection with a prosecutor's closing argument is whether the challenged remarks were improper and whether they prejudicially affected substantial rights of the defendant. *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. 1981); *United States v. Garza*, 608 F.2d 659, 663 (5th Cir. 1979); *United States v. Corona*, 551 F.2d 1386, 1388 (5th Cir. 1977). Employing this standard, we find neither of Field's claims to be persuasive.

The first prong of Field's argument focuses upon the prosecutor's statements made in the course of his rebuttal argument that Field was the "elusive" "number one man" who was sharing in the "pot" comprised of illegal payoff money. (98:226-227, 231-232). Counsel for Field objected to those statements on the ground that they were not supported by any evidence in the case. The trial court sustained the objection, agreeing that there was no direct evidence to support the prosecutor's assertions. The court found, however, that the prosecutor's characterizations of Field's role in the conspiracy were reasonable inferences that could be drawn from the evidence and directed the prosecutor to adjust his line of argument accordingly. The prosecutor obeyed the court's instructions and argued to the jury that:

although there is no direct evidence—and we would submit that, given the way this enterprise operated, there wouldn't be—although there was no direct evidence, it is reasonably inferable from the facts, from the testimony, the direct acts of Mr. Field, the statements of co-conspirators during the furtherance and during the course of the conspiracy,

that Mr. Field was, in fact, the man or one of the men that was sharing in the pot.

(98:236).

Contrary to Field's claims, at no point did the prosecutor offer his own opinion in an attempt to vouch for the government's case. That, of course, would be improper. *United States v. Corona, supra*, 551 F.2d at 1389; *United States v. Herrera*, 531 F.2d 788, 790 (5th Cir. 1976); *Gradsky v. United States*, 373 F.2d 706, 710 (5th Cir. 1967). Similarly, the prosecutor's statements cannot be characterized as a suggestion that he possessed evidence other than that produced at trial that proved Field's complicity. That, too, would be improper. *Berger v. United States*, 295 U.S. 78, 85, 55 S. Ct. 629, 632, 79 L. Ed. 1314 (1935); *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978); *United States v. Corona, supra*, 551 F.2d at 1390.

We believe the remarks made by the prosecutor constituted a fair and permissible effort to argue the reasonable inferences that could be drawn from the evidence in the case. The evidence against Field has been discussed in detail and it is unnecessary to recount it at length here. Suffice it to say that the evidence was clearly sufficient for the jury to reasonably infer that Field shared in the proceeds of the payoff scheme. The evidence also supported the inference that Field was the "number one man" in the criminal enterprise. For example, when Teitlebaum agreed to surrender the Mamenic account to acquire the Zim account, Boyle said he would report the decision to Field. Similarly, when Boyle was pressing Teitlebaum to catch up on his delinquent payments, he told Teitlebaum that he was going to meet with Field in Savannah and wanted "everyone to know we were up to date." In late 1976, Boyle told Teitlebaum that Field

was unhappy with him for refusing to cooperate with his competitors, who were also making payoffs to the union officials. Finally, it was Field who first organized the Miami checkers' union that employed Boyle, Barone and Vanderwyde.

Because there was some evidence supporting the inference that Field was one of the principal figures in the enterprise, the comments of the prosecutor were not patently improper. In this respect, the instant case is similar to *United States v. Allen*, 588 F.2d 1100 (5th Cir. 1979). In *Allen*, the prosecutor remarked in his closing argument that defendant Perkins had succeeded a man named Pace as the head of a lottery operation. On appeal, Perkins argued that the prosecutor's comments were improper because there was no direct evidence tending to show that Perkins succeeded to Pace's position as operator of the lottery. The court of appeals rejected the argument on the ground that "an attorney is entitled to urge the conclusions which the attorney thinks the jury should draw from the evidence." 588 F.2d at 1108. Because there was some evidence to support the inference that Perkins had in fact succeeded Pace, the court found the prosecutor's comments to that effect to be justified, concluding that:

[e]ach attempt to draw an inference such as this should not be the basis of an objection by defense counsel, much less lead to a mistrial.

Even if the inference which the prosecution sought to draw here was beyond the reach of the evidence in this case, it was not substantially prejudicial as to require a mistrial.

588 F.2d at 1108; see *United States v. Rodgers, supra*, 624 F.2d at 1311. Like the prosecutor in *Allen*, the prosecutor below was entitled to argue all reasonable

inferences drawn from the evidence to the jury, including the inference that Field was one of the principal participants who shared in the proceeds of the enterprise.

The second portion of Field's claim relating to the prosecutor's closing argument arises from the following comments made at the end of the prosecutor's rebuttal argument:

[Y]ou ladies and gentlemen, representing the citizens of this community and the citizens of South-eastern United States by your verdict are telling them that enough is enough. We ask you by your verdict, ladies and gentlemen, to help clean up Dodge Island. We ask you by your verdict to help rid the ports of Jacksonville, Savannah and Charleston of people who by participating, directly and indirectly, in racketeering activity are corrupting our nation's ports, who by misusing and utilizing their position of fiduciary responsibility on behalf of unions and on behalf of different companies are influencing and controlling and affecting the lives of people and everyone that works in these different cities.

By your verdict, ladies and gentlemen, we ask you to tell them enough is enough.

(98:237-238). Field moved for a mistrial on the ground that these comments suggested to the jurors that they had a personal stake in the outcome of the case, but the motion was denied.

The challenged remarks, while approaching the line demarcating permissible oratorical flourish from impermissible comment calculated to incite the jury against the accused, did not constitute a direct suggestion that the jury had a personal stake in the outcome of the case. Appeals to the jury to act as the conscience of the community, unless designed to inflame the jury, are not

per se impermissible. *United States v. Lewis*, 547 F.2d 1030, 1037 (8th Cir. 1976), cert. denied, 429 U.S. 1111, 97 S. Ct. 1149, 51 L. Ed. 2d 566 (1977); see *United States v. Alloway*, 397 F.2d 105, 113 (6th Cir. 1968). Even assuming, however, that the statements were improper, they were not so offensive as to prejudice any substantial rights of Field or the other appellants.

H. Forfeiture

Appellants Morales and Raymond Kopituk contest the forfeiture of their interest in Florida Welding Services Corp., but it is clear that their claim is not properly before this Court. In accordance with the decision of Morales and Kopituk to waive trial by jury as to the forfeiture issues in the case, separate forfeiture proceedings commenced before the district judge following return of the jury's verdicts.

On January 11, 1980, the district court denied appellants' post-trial motions and entered separate Judgment & Commitment Orders with respect to each appellant, including Morales and Kopituk. On January 14, 1980, Morales and Kopituk filed their respective Notices of Appeal from the Judgment & Commitment Orders and order denying their post-trial motions.

On April 7, 1981, the district court entered its final judgment pertaining to the forfeiture of Morales' and Kopituk's interests in Florida Welding Services Corp. No appeal from that order was ever taken. Indeed, that order is not even part of the record on appeal. Morales and Kopituk bore the responsibility to include in the record on appeal all material upon which they intended to rely. *United States v. Gerald*, 624 F.2d 1291, 1296 n.1 (5th Cir. 1980), cert. denied, 450 U.S. 920, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981). This would neces-

sarily include all orders of court which they contend are in error.

The forfeiture judgment entered in this cause was separate and distinct from the Judgment & Commitment Orders, arising as it did from a separate proceeding. Consequently, Morales and Kopituk were required to file a separate notice of appeal from the forfeiture judgment. Because they failed to do so, we are unable to consider the merits of that judgment.

CONCLUSION

The trial below was a long and arduous affair, fraught with the difficulties one would expect from a seven month proceeding involving numerous defendants and offenses. Much credit is due to the trial judge who continually exhibited thoughtful, evenhanded judgment in resolving the dilemmas, both legal and otherwise, that arose on a daily basis. While the proceedings were not error-free, we believe that, overall, all parties received a fair and just trial. Accordingly, the convictions of William Boyle, George Barone, James Vanderwyde, Fred R. Field, Jr., Landon Williams, Cleveland Turner, Oscar Morales, Raymond Kopituk and Dorothy Kopituk are hereby AFFIRMED.⁵¹

⁵¹ Issues raised by appellants, but not expressly dealt with in this opinion, have been considered and rejected as not worthy of discussion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 80-5025

[Filed: January 14, 1983]

*United States of America,
Plaintiff-Appellee,*

v.

*Dorothy O. Kopituk, Raymond C. Kopituk,
Oscar Morales, Fred R. Field, Jr., Cleveland
Turner, James Vanderwyde, Landon L.
Williams, William Boyle, and George Barone,
Defendants-Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion November 4, 1982, 11 Cir., 1982, ___ F.2d
___).

(January 14, 1983)

Before HILL and CLARK, Circuit Judges, and SCOTT,
District Judge.*

* Hon. Charles R. Scott, Sr., U.S. District Judge from the Middle
District of Florida, sitting by designation.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

No. 78-185-CR-WMH

*United States of America,
Plaintiff,*

v.

*George Barone, William Boyle, Isom Clemon, Fred R.
Field, Jr., Dorothy O. Kopituk, Raymond C. Kopituk,
Oscar Morales, Cleveland Turner, James Vanderwyde,
and Landon L. Williams,*

Defendants,

John F. Evans, S. Michael Levin, Alexander S. White,
U.S. Dept. of Justice, Southeastern Regional Strike
Force, Miami, Fla., for plaintiff.

E. David Rosen, Miami, Fla., for defendant Barone.

Michael A. Masin, Miami, Fla., for defendant Boyle.

James W. Matthews, Miami, Fla., for defendant
Clemon.

Max B. Kogen, Miami, Fla., for defendant Field.

Karl J. Leib, Jr., Miami, Fla., for defendants Dorothy
and Raymond Kopituk and Morales.

Michael H. Tarkoff, Miami, Fla., for defendant Turner.

Joseph Varon, Hollywood, Fla., for defendant Vander-
wyde.

Lacy Mahon, Jacksonville, Fla., for defendant Williams.

ORDER REPLACING JUROR

August 28, 1979

HOEVELER, District Judge.

The issue of juror replacement came before the Court as a result of the illness of Juror Dorothy Loescher subsequent to the beginning of deliberations. Because of the unusual circumstances involved, I feel that a full development of the basis for this order replacing Juror Dorothy Loescher with an alternate is indicated.

This case began on January 29, 1979. Because of attendant publicity and the expected length of the case, a bifurcated and detailed jury selection process was undertaken. Eight days were expended in selecting twelve regular and six alternate jurors. Thereafter, a "James" hearing was conducted in an effort to follow the direction of *U.S. v. James, et al.*, 590 F.2d 575 (5th Cir. 1979). Because of the number of defendants charged with conspiracy and the volume of evidence, this procedure consumed between five and six days.

In the ensuing months of trial, a multitude of witnesses were presented and over a thousand exhibits were received in evidence. Legal arguments spawned by a variety of objections made by both sides consumed, considered in sum, many days. Closing arguments started after approximately six months of trial, lasted for six days during which the positions of the government and the ten remaining defendants were developed. All jurors, including the alternates, heard the entirety of the evidence and arguments.

The jury was instructed as to the law on August 11, 1979 but deliberation was postponed until August 13th. The entire jury including the two alternates had been sequestered as of Wednesday, August 8th (during closing arguments), but immediately after instructions on the law, the alternates were separated from the regular jury. On Friday, August 17th, the jury forewoman asked for an early recess because of the condition of Juror Loescher. Over the weekend recess, her condition apparently became worse and on Monday, August 20th, the forewoman requested professional help. Mrs. Loescher was examined on August 20th and was removed from the jury on August 21st, pursuant to the recommendation (and testimony) of Dr. Bruce Alspach, an experienced and qualified psychiatrist. No party has taken issue with the correctness of the Court's action in removing Juror Loescher.

When the "regular" jury retired to deliberate, the two alternates were removed from its presence and indeed, were removed to a different floor in the hotel in which all jurors were sequestered. The alternates remained separated from the other jurors thereafter. On August 15th, it appearing there were no problems with the deliberating jurors, both alternates were discharged to their homes, but with instructions to avoid any media coverage and to avoid discussing the case with anyone. They were further advised that they might be recalled and that they should be in readiness in the event of any contingency.

When it became apparent that Juror Loescher might have a serious problem, alternate Therese Ann Evangelist was asked to return to court. She did so and was sequestered pending resolution of Mrs. Loescher's problem. She was, thereafter, examined by me in open court

regarding any exposure to media, conversation regarding the case, or the other jurors. She had not been so exposed and stated she could continue to give all parties a fair trial. Subsequent to the examination of alternate juror Evangelist, each of the eleven remaining jurors was individually examined by the Court (with counsel permitted to and in fact submitting questions to the Court) as to whether they could begin deliberations anew and whether, if they had either personally or collectively arrived at opinions or conclusions, they could erase these from their thoughts and begin again giving consideration to what juror Evangelist and all other jurors would offer in deliberation. Each stated, after having been sworn for this particular examination, that he or she could and would begin anew.

On August 21st, after almost seven months, this Court was presented with a somewhat unique problem as to the proper and just way to proceed. Eleven fit jurors were prepared to proceed, almost seven months of their lives having been devoted to this effort. A qualified and healthy alternate, who had heard all of the evidence and the arguments, was prepared to go forward. In short, in a setting of massive effort on the part of all parties; of a trial presenting complex issues involving many counts, beginning with twenty-two and ending with ten defendants (as the result of guilty pleas, severances and one acquittal); where the physical and mental as well as financial strain were considerations; where the Court had twelve qualified and well jurors, willing and prepared to proceed, the question presented was whether to abort the proceedings by mistrial or to permit the twelve jurors to do what they said they could—deliberate fully and without prejudice. My decision was to proceed and on Thursday, August 22nd, alternate juror Evangelist was

made a member of the jury, all jurors were reinstated and they retired to deliberate.

I am mindful of Rule 24(c), F.R.C.P. In the many criminal cases over which this Court has presided in the past two years and three months alternate jurors have uniformly been discharged upon retirement of the principal jury. Certainly, the need for consistent adherence to the rules of procedure cannot be gainsaid. It must be kept in mind, however, that Rule 24(c) is indeed a rule of procedure and that in unusual circumstances it may well be that the demands of essential justice require a Court to rule on substance rather than form, particularly when, as here, there appears to be a clear collision between the two.

Perhaps to suggest a collision begs the proper question as to whether there really is conflict. There has been substantial compliance with the spirit of Rule 24(c). As stated previously, the alternates were isolated from the regular jury and the record is clear that there was no contact and therefore no taint by any alternate. This end would appear to be the principal purpose of the Rule. The main question seems to be whether an alternate juror who has remained unsullied by outside contact or contact with the other jurors can replace a juror who becomes ill during deliberations.

It is my earnest desire to adhere to the requirements of the approved rules, those procedures which are mandated and the cases of this circuit, but in so doing to accomplish these ends in a manner which achieves essential justice. There are few instances in which a District Judge should attempt innovation, as I share the observation that District Judges should apply the law rather than make it. Nonetheless, this case cries out for the careful application of any procedure which can

secure a just and non-prejudicial result. Every effort has been made to achieve this.

Rules 24(c), Federal Rules of Criminal Procedure, provides in pertinent part as follows:

Alternate jurors in the order in which they are called shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror *shall be discharged after the jury retires to consider its verdict*. [Emphasis supplied]

The provision, that an alternate who does not replace a regular juror be discharged when the jury retires, has been characterized by our Court of Appeals as "a mandatory requirement that should be scrupulously followed." *U.S. v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973). This Court, like the trial court in *Allison*, has, of course, violated that rule in its literal terms. Yet, despite the mandatory language of the rule, the *Allison* Court rejected the contention of the defendants that any departure from the rule automatically required a new trial. Rather than the *per se* or automatic application urged, the Court adopted the standard that a new trial would not be required unless there was a "reasonable possibility" that the violation of the rule had resulted in some prejudicial effect on the jury's verdict. The case was, therefore, remanded to the trial court with directions to conduct an evidentiary hearing and make findings and conclusions. The trial judge's finding on remand, that there was no reasonable possibility that the presence of the alternate juror during the deliberations affected the verdict, was subsequently affirmed. *U.S. v. Allison*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982, 94 S. Ct. 2383, 40 L. Ed. 2d 759 (1974).

The Second Circuit had earlier considered the same issue raised in *Allison* and reached the same result in the case of *U.S. v. Hayutin*, 398 F.2d 944 (2d Cir. 1968), *cert. denied*, 393 U.S. 961, 89 S. Ct. 400, 21 L. Ed. 2d 374 (1968), *subsequent appeal sub nom.*, *U.S. v. Nash*, 414 F.2d 234 (2d Cir. 1969), *cert. denied*, 396 U.S. 940, 90 S. Ct. 375, 24 L. Ed. 2d 242 (1969). In that case, the trial court had refused defendant's request to discharge the three remaining jurors after the jury had retired to consider its verdict. Unlike the situation in *Allison*, the retained alternates had not retired with the regular jurors to the jury room but had been kept separated. Although the command of Rule 24 had not been observed, there was no indication of any contact between the alternates and the regular jurors. Thus, no prejudice had resulted to the defendant when there was no "risk of having his guilt determined by the three alternates in addition to the regular jurors." *Hayutin, supra*, at p. 950; *Nash, supra*, at p. 236.

Allison, of course, is factually distinguishable from the instant situation, as there the alternate juror retired with the other twelve to the jury room and remained there during part of the deliberations. In our case, the alternates had been segregated from the original twelve, and at no time have there been more than twelve jurors in the jury room during deliberations. The replacement of a disabled juror with an alternate will not result in the possibility, raised in *Allison*, of an extra juror participating in the deliberations or improperly taking part in any votes of the jury. Nor is there the possibility that the mere presence of an alternate restrained any of the regular jurors in expressing his views or in exercising his independence of thought and action. After the installation of the alternate as a member of this jury, her presence, participation, and influence will be an integral

part of the proceedings, rather than a source of potential outside influence or contamination.

As in *Nash, supra* (and as pointed out above), this alternate has been kept away from the original jurors. The record will show that there is absolutely no evidence that "any communications or conversations took place between the regular jury and the alternates." *Id.* at p. 235. In fact, all of the evidence, including the testimony of the jurors themselves, shows conclusively that there has been, not only no "prejudicial" or "impermissible" contact, but no contact whatsoever of any kind between this alternate and the original jury.

The technical violations of the rule, which occurred when the Court failed to discharge the alternates upon the retiring of the jury, has thus resulted in no prejudice to any defendant. The Court is not concerned, however, with the question of extra jurors in the jury room (*Allison*) nor with the question of possible influence on the twelve by a retained alternate not physically present during the deliberative process (*Hayutin, Nash*). Again, the issue is the propriety of substituting an alternate to make up the full complement of twelve jurors.

This Court has been unable to find any reported case from the Court of Appeals for the Fifth Circuit or from the Supreme Court of the United States treating the question of substitution of an alternate after the jury has retired and begun the business of deliberating.

There are several cases from other jurisdictions approving such a substitution when all parties have stipulated to the procedure. The theoretical basis of these cases is found in the Supreme Court opinion in *Patton v. U.S.*, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930). It was there held that a defendant in a criminal case might waive his right to "trial by a constitutional jury and

submit to trial by a jury of less than twelve persons," *id.*, at p. 312, 50 S. Ct. at p. 263, provided there was consent of government counsel and the sanction of the court, in addition to the express and intelligent consent of the defendant.

Relying on the *Patton* criteria for effective waiver of constitutional jury rights, the Tenth Circuit, in *U.S. v. Baccari*, 489 F.2d 274 (10th Cir. 1973), *cert. denied*, 417 U.S. 914, 94 S. Ct. 2614, 41 L. Ed. 2d 218 (1974), expressed its approval of a stipulation by the parties to replace an ill juror with an alternate after deliberations had begun.

The Ninth Circuit had also approved such a stipulation in the case of *Leser v. U.S.*, 358 F.2d 313 (9th Cir. 1966), *cert. dismissed*, 385 U.S. 802, 87 S. Ct. 10, 17 L. Ed. 2d 49 (1966). In that case, defense counsel had expressly consented and stipulated to the replacement of an ailing juror after deliberations began. Defendants contended on appeal that the stipulation by counsel was ineffective without defendants' *specific* assent thereto. In rejecting this argument, the Court found that appellants had "knowingly and intelligently acquiesced in the voluntary stipulation of their counsel," and thus, the stipulation effectively bound the defendants. *Id.*, at p. 317.

Leser was later cited by the dissenters in *U.S. v. Lamb*, 529 F.2d 1153, 1162 (9th Cir. 1975), as holding that "the substitution process does not of itself deprive a defendant of his right to a full consideration of his case by an impartial jury panel."

Stipulations as to retaining an alternate beyond the time indicated by the rule, rather than substituting an alternate, have also been dealt with by various Courts.

In *U.S. v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964), defendants' convictions were reversed because of a violation of Rule 24(c), even though the defendants had agreed to the very procedure violative of the rule. The violation there consisted in the trial court's having allowed (with the agreement of counsel for both sides) an alternate juror to retire with the jury and remain there during deliberations. Although the alternate was admonished not to participate and to say nothing unless one of the regular jurors should become ill or "disqualified," the alternate had been present with the twelve regular jurors throughout the deliberations. Three reasons were given for the Court's disapproval of the procedure employed. First, it would seem that the trial judge, in ordering the alternate not to participate unless the regular juror became ill, had left open the question of who was to make that decision—perhaps the alternate himself, the ailing juror, the eleven others, or all of them. Second, even if the alternate had followed the Court's instructions in remaining silent during the deliberations (a fact not revealed by the record), his attitude, as conveyed by facial expression, gestures, or the like, may have been transmitted to the other jurors and had some effect on one or more of them. Third, the alternate's mere presence in the jury room violated the cardinal principle that the deliberations of the jury shall remain private and secret. And his presence may have operated to some extent as a restraint upon the jurors in their freedom of action and expression.

Contrast with that case the Fifth Circuit's approach in *U.S. v. Allison, supra*. That Court found *Virginia Erection* distinguishable, and remanded for a determination as to possible prejudice flowing from the fact that the alternate, by agreement, was allowed to sit in on the deliberations.

The Fifth Circuit has also approved in a civil case an agreement by counsel that an alternate go with the other jurors into the jury room without participation in the deliberations unless and until the regular juror was excused. *La-Tex Supply Co. v. Fruehauf Trailer Division*, 444 F.2d 1366 (5th Cir. 1971), cert. denied, 404 U.S. 942, 92 S. Ct. 287, 30 L. Ed. 2d 256 (1971). Although it appeared in that case that the alternate had disregarded the court's instructions not to participate, by making at least one remark, the Court found that no prejudicial error had occurred.

The defendants in the instant case have, however, unanimously objected both to the Court's failure to discharge the alternates on August 11 and to the replacement of Mrs. Loescher with Mrs. Evangelist. The above cases dealing with stipulations to these procedures are instructive only insofar as they deal with the reason underlying the rule.

The leading case on substitution of an alternate juror after deliberations have begun (absent some stipulation of defense counsel) is *U.S. v. Lamb*, 529 F.2d 1153 (9th Cir. 1975). In that case, the Court instructed the jury of twelve and then told an alternate to "stand by" in case she was needed. After retiring, one of the jurors sent the judge a note stating that she felt emotionally unable to come to a decision. The judge then called the alternate and asked her to return to court. When he was later informed that the jury had, in fact, reached a verdict, he called the alternate back and told her not to return. The verdict of guilty tendered by the first jury was not accepted by the Court because it was inconsistent with the instructions; and it was at that point that the note-writing juror was excused and the alternate substituted. The jury was then reconstituted and told to begin their

deliberations anew. After only 29 minutes of deliberation (as contrasted with four hours of deliberation the first time), the newly constituted jury returned a second guilty verdict.

After discussing the mandatory nature of Rule 24(c), the Ninth Circuit, *en banc*, listed some of the "sound reasons" underlying the rule. Among them were the inherent coercive effect upon an alternate who joins a jury that has already agreed that the accused is guilty and the possibility that a lone juror who would not vote for conviction would be under great pressure to feign illness or other incapacity so as to place the burden of decision on an alternate juror. It was apparent to the appellate court, from the fact that the second verdict had required only 29 minutes to reach, both that the alternate had been impermissibly coerced and also that the jury had not given the conscientious, careful reconsideration ordered by the judge in his instruction to "begin at the beginning." *Id.* at p. 1156.

In that case, the defense attorney had vigorously objected to the substitution. Even had he so stipulated, however, the Court indicated that it was doubtful that such a stipulation would remain effective after the "dramatic changes of circumstances" above outlined. Furthermore, because the court had released the alternate, she may have no longer remained a qualified juror, the release having relieved her of the obligations of the usual juror, including the obligation of confidentiality, and the record being devoid of any indication of whether she had discussed the case with others after her release.

Lamb is, of course, not binding on this Court. Even if it were, the peculiar facts of that case are clearly distinguishable from the case at bar. Further, the reasons given in support of the rule in *Lamb* simply do not

apply here. This Court has taken great pains to negate any possible "coercive effect" on the substituted juror. Each and every one of the eleven jurors was questioned exhaustively as to his or her willingness to begin deliberations anew, giving due consideration to the views of the others, including those of their new member. Without exception, each juror indicated not only that he or she *could* do that, but also that he or she *would* do that. Thus, the danger of prejudice so obvious to the *Lamb* Court is totally lacking in this case. In addition, there is no possibility that Mrs. Evangelist is not now a qualified juror. She was not released from the usual obligations of a juror. Quite the contrary, she was expressly instructed when the jury retired on August 11th to avoid all media coverage of the case and all discussion of the case with third parties. When she was called back, she was questioned on two separate occasions, and she stated in no uncertain terms that she had faithfully adhered to those instructions. A well reasoned dissent is also instructive on the question.

Exhaustive research has revealed only one federal case other than *Lamb* apparently treating the issue of replacement of a disqualified juror after deliberations have begun, absent a stipulation of the parties. In *Champagne v. U.S.* (petition for cert. filed May 26, 1978, noted at 47 USLW 3173, cert. denied, 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422), defendant's conviction was affirmed by the Second Circuit without written opinion. An opinion or further detail on the circumstances of the case is unavailable at this writing; but it would appear from the notation at 439 U.S. 964, 99 S. Ct. 450, 58 L. Ed. 2d 422 that the trial court had denied defendant's motion for mistrial and allowed an alternate juror to be substituted for a member of the original panel after the jury had retired. Whether this was an issue upon which

the Court of Appeals based its affirmation of his convictions is not entirely clear.

Because neither the Court of Appeals for the Fifth Circuit nor the Supreme Court of the United States has yet decided (insofar as this Court is aware) a case presenting this exact issue, this Court has looked elsewhere for guidance. The case that, in the opinion of this Court, is most persuasive is *People v. Collins*, 17 Cal. 3d 687, 131 Cal. Rptr. 782, 552 P.2d 742 (1976), *cert. denied*, 429 U.S. 1077, 97 S. Ct. 820, 50 L. Ed. 2d 796 (1977). After the jury there had begun its deliberations, an alternate was substituted for one of the original jurors. Defendant appealed from the judgment of conviction, contending, *inter alia*, that the substitution violated his constitutional right to trial by jury.¹

The trial court there had received a note from one of the jurors requesting to be excused from deliberations because of inability to follow the court's instructions concerning the deliberations. She was questioned by the court, and it developed that the problem was of an emotional nature, stemming from her inability to cope with the experience of being a juror. She was then dismissed, and an alternate juror substituted over the objection of defendant and despite his motion for mistrial, which was denied.

The Court held that the substitution of an alternate for an original juror was constitutionally permissible after

¹ Although the Court stated that the question was controlled by defendant's right to trial by jury as guaranteed by the California state constitution, the state constitution does not differ fundamentally from the federal constitution in this regard. Consequently, this Court agrees with the California Supreme Court that the result reached satisfied minimum federal constitutional standards. *Id.*, at p. 745, n.3.

deliberations have begun, when good cause has been shown and the jury has been instructed to begin its deliberations anew. Noting that substitution of an alternate juror was desirable to maintain judicial efficiency in that it might avoid retrial of lengthy cases, and although a state statute expressly permitted the substitution, the Court deemed it necessary to examine in depth the nature of the defendant's right to trial by jury, which right might be "trenched upon" by substitution of jurors.

That right includes among its essential elements, the requirement that the jury consist of twelve persons and that its verdict be unanimous. These elements are, in turn, part of a broader right which additionally requires each juror to have engaged in all of the jury's deliberations.

The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all the evidence

and argument and who together have deliberated to unanimity. *Id.*, at p. 746.

The Court thus rejected the government's contention that substitution of an alternate juror after deliberations have begun does not constitutionally require that deliberations commence anew. More importantly for our purposes, the Court rejected defendant's contention that a mistrial must be declared when a juror is dismissed for good cause after deliberations have begun. "[T]he right to trial by jury does not require a declaration of a mistrial when a properly qualified alternate juror is available and that juror fully participates in all of the deliberations which lead to a verdict." *Id.* Although the trial court had, therefore, erred in failing to instruct the jury to begin its deliberations anew with the substitution, the error was harmless in view of the strength of the case against the defendant.

In a footnote (at p. 747), the California Court reviewed the authorities cited by the defendant which forbid substitution and found them "not persuasive." For example, the case of *People v. Ryan*, 19 N.Y.C.A. 1966), involved a similar statute in New York which was held unconstitutional on state constitutional grounds, the New York Court of Appeals reasoning that the substituted alternate had not participated in all deliberations which led to the verdict.

Other adverse authorities, such as the *Lamb* case, also appear to the California Court to turn on the prejudice inherent when the jury does not begin at the beginning in its deliberations. Professor Wright, for instance, bases his conclusion (that substitution after deliberation begins is reversible error) on the *Ryan* case, *supra*, and on the fact that substitution "would require either that the alternate participate though he has missed part of the

jury discussion, or that he sit in with the jury in every case on the chance he might be needed." 2 Wright, Federal Practice and Procedure, § 388, at p. 53.

Further, the ABA Standards Relating to Trial by Jury (1968), standard 27, at pp. 78-78, and the commentary thereto, reject an approach allowing substitution after deliberations begin on the grounds that it is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without benefit of the prior group discussion.

All of these authorities have assumed, as a basis for their disapproval of substitution, a fact whose existence is negated by the procedure indicated in *Collins* and followed by this Court. If the jury is instructed to begin anew with its entire process of deliberation and if the substituted alternate participates fully in those deliberations, the fundamental right of the defendant to a unanimous verdict by a jury of twelve is preserved inviolate.

This Court has made great effort to ensure that defendants' rights are protected. As stated by the dissenters in *Lamb, supra*, at p. 1161, "[t]he central issue in these cases is whether the violation of Rule 24(c) is prejudicial to the defendant."

This Circuit has adopted that approach in at least two different kinds of violation of the Rule. In one case, *U.S. v. Cohen*, 530 F.2d 43 (5th Cir. 1976), *cert. denied*, 429 U.S. 855, 97 S. Ct. 149, 50 L. Ed. 2d 130 (1976), the Court of Appeals affirmed defendant's conviction over his contention that the trial court had violated Rule 24(c) by replacing a "sleeping juror" with an alternate after the jury had been ordered to retire but before deliberations had actually commenced. Rejecting defend-

ant's interpretation as "too formalistic," *id.*, at p. 48, the Court found no violation of the rule.

The other case where our Circuit has rejected a formalistic approach to violation of the rule in favor of one which focuses on prejudice to defendants is, of course, *Allison*. That case involved, as previously indicated, the presence of an alternate in the jury room, rather than the replacement of a disqualified juror with an alternate. It has been said that the mere presence of an alternate juror in the jury room "destroys the sanctity of the jury." *U.S. v. Beasley*, 464 F.2d 468, 470 (10th Cir. 1972). When an alternate is present, thereby violating the privacy of jury deliberations, a problem of constitutional dimension may arise. Thus, there is "greater justification for a rule of reversal per se where an alternate is present during deliberations [citations omitted] than where an alternate is substituted after deliberations have commenced [citations omitted]." *Lamb, supra*, dissenting opinion, at p. 1160. Significantly, a proposed amendment to the Rule would have expressly prohibited attendance by alternates during deliberations, but would have allowed substitution when necessary. *Id.* If there is room for flexibility in application of the rule to the greater evil contemplated by the presence of an alternate in the jury room, there is surely much to be said for allowing substitution, where no possible outside taint or invasion has occurred.

Lastly, it should be noted that the Report of the Committee on the Operation of the Jury System to the Chief Justice and members of the Judicial Conference, supports an amendment which would authorize the retention of alternate jurors after the deliberations have begun and their subsequent substitution on the jury, if necessary, with the requirement that "all facts shall

be reviewed and discussed" with the alternates before deliberations resume. The Committee will recommend such an amendment to permit greater flexibility in the employment of alternate jurors without stipulation and to "remove any doubt as to the propriety of such procedures."

CONCLUSION

In the absence of any clear and binding precedent on the precise point in issue, this Court has attempted to follow the principle expressed by the Fifth Circuit in *Allison*, at p. 472, that is, to frame relief "which will give due regard to the rights of the [defendants], will likewise accord to the government an opportunity to preserve a fair conviction if no prejudice is shown, and which may thus avoid the necessity of another trial."

That Court also observed that "[b]ecause any benefit to be derived from deviating from the Rule is unclear and the possibility of prejudice so great, it is foolhardy to depart from the explicit command of Rule 24." *Id.* The dilemma in which this Court has been placed compels the opposite conclusion on these facts. That is, because the benefit to be derived from deviating from the Rule is so great, and the possibility of prejudice unclear (indeed nonexistent), it is, if not foolhardy, inimical to the ends of justice for all concerned *not* to depart from the explicit command of the Rule.

For the foregoing reasons, it is thereby

ORDERED AND ADJUDGED that the alternate juror, Mrs. Therese Ann Evangelist, be substituted for the discharged and disabled juror, Mrs. Dorothy Loescher.

APPENDIX D

EXCERPTS FROM TRIAL TRANSCRIPT
August 11, 1979

VOLUME 99

[138]

* * *

[*The Court:*] If you have any questions about the evidence, please do not hesitate to get whatever assistance we can give you. If we can give it to you, we will give it to you, if the law permits, and certainly we can give you assistance in connection with instructions, if that need be.

I hope it isn't necessary, but if it is necessary, then keep in mind that the Court is here to serve you.

Any contact with the Court must be made through the Marshal, who will be in charge of you at all times.

In arriving at a verdict, each of you must make up your own mind after consideration of all of the evidence as it is recalled by you. That consideration should include the opinions of your fellow jurors, as well as your own.

It is the essence of the jury system that you will listen to the views of one another and that you will do so with open minds and with a disposition to accept the views of the others, if the reasons advanced are persuasive, based on the evidence and not contrary to the Court's instructions on the record.

[139] Any juror who, after such consideration of all of the evidence, comes to a firm conclusion different from the others should not change that conclusion merely for the sake of conformity or unanimity.

You should, however, listen to and consider with all the views of your fellow jurors so that, if possible, you may arrive at a unanimous verdict.

In this court, in order to render a verdict in any case, all of the jurors must concur. That means that each and every one of you must agree, must concur, in the verdicts that you return in this case.

Upon retiring to the jury room, you will select one of your number to act as a foreman or forewoman. That person will preside over your deliberations and will be your spokesman here in court.

To assist you in your deliberations, a form of verdict has been prepared for your use, and this form is self-explanatory. Within limits, I am going to try to explain it to you in a little bit more detail.

* * *

[141] At this point I am going to ask Mr. Clem and Mrs. Evangelist to wait while the other jurors retire, and I will take up with you your duties after [142] they have left.

* * *

[144] (Whereupon, the jury was excused to deliberate upon their verdicts at 1:00 p.m.)

The Court: Gentlemen, of course, all clients can be at ease and leave if they want to.

Mr. Clem and Mrs. Evangelist, I must confess I have not finally determined how I am going to handle your situation. I would like you to do this:

I would like you to go back to your hotel and remain there until I have communicated with you further through the Marshal. I want to take up with counsel your situation as to whether or not we are going to discharge you now and keep you in attendance otherwise,

or keep you with us for some period of time, and I am not sure just what that will be, but I am going to ask you now—and I must suggest this to you—I am not suggesting.

I am directing you not to go back into the jury room under any circumstances.

If you have anything in there, get the marshal to get it for you. You must not be in communication with the jury at any time while they are deliberating.

I am going to ask you, in fact, not to [145] be in communication with the jury under any circumstances hereafter, unless I tell you differently.

All right. We will be in touch with you within the next hour, so you are excused.

Mr. Rosen: Judge, I don't think they have transportation. The marshal brought them.

The Court: You are at the duPont Plaza?

Juror Clem: Yes, sir.

The Court: You probably will not have transportation back. I am sure that your cost of transportation, if you wish to take a cab, or something like that, will be provided.

Mr. Evans: Your Honor, can we get the marshals to take care of that?

The Court: Well, yes.

Mr. Evans: I think that is the proper way to handle it. In fact, I am convinced it is.

The Court: I think that is probably so. Will you take care of that, Pilar?

Get a marshal to take these folks back. Would you, please, exit out that way.

Mr. Masin: You instructed them not to communicate with any other juror. They should be instructed not to include anyone, including the press, or what-have-you; anybody.

[146] **The Court:** Does anybody else have any suggestions?

Mr. Masin just made a valid suggestion. Does anyone else have any input on this problem? We can take it up at side bar.

I omitted to mention, Mr. Clem and Mrs. Evangelist, that which I should have, and that is, you should not talk to anybody, not the Press, not to the lawyers, not to anyone else about this case.

There is still a possibility that you may have to serve. Pilar is going to get a marshal to take you back to the hotel. We will be in communication with you within the next hour.

Thank you.

Pilar, would you take them out?

(Alternate jurors excused)

The Court: If you will just wait in the hall, please.

* * *

[154] [The Court:] Gentlemen, we first must deal with the question of these two alternates. It is a very difficult and sensitive problem, in my mind.

I am reluctant to leave them in that hotel where they are in proximity on the same floor with the other jurors.

On the other hand, I am not in favor of releasing them at this time.

Mr. Rosen: Your Honor, I think the law is clear that once the jury starts—

The Court: I am not sure the law is that clear.

Mr. Rosen: I think so.

First of all, the rule provides they shall be discharged. That is the clear language of the rule dealing with alternate jurors, once they start deliberating, and I just wish them well and hope they are all healthy, but that is the way the system works.

[155] *Mr. Evans:* Well, the Fifth Circuit case law, Your Honor, we would agree is not all that clear, and I, frankly, am not conversant with it.

We just have not had an opportunity in recent days to review it, but Mr. White is much more familiar with it than I am, and he has advised that in his judgment in this Circuit there are alternatives to an outright discharge that we have at this point.

The Court: Well, in some circuits, at least one other circuit that I'm aware of—and there may be more—alternate jurors have actually been brought back into the deliberations when a serving juror has become ill or dies, or whatever, and the Court has directed the jurors to begin the deliberations afresh with the alternate juror.

Now, whether or not that has gone to the circuits in these particular jurisdictions I'm not aware, but it has been done.

Mr. Levin: Did Your Honor refer to a recent Fifth Circuit decision the other day?

The Court: It is not the Fifth Circuit that I am thinking about. It is not a new idea, believe me.

Mr. Evans: If we could, Your Honor, in view of the length of this trial, I mean, if something [156] happened to one of these jurors, if there is any human way possible to ask that the alternates stay around, at least

for a reasonable period of time, we are going to request that that be done.

The Court: Well, that is what I am going to do.

Now, the next question is how to do it, to just discharge them to their homes. There obviously is going to be publicity about the case now, or put them in the same hotel on a separate floor.

I would rather they were not in proximity to the other jurors who are deliberating, and they should not be.

Mr. Masin: It is just my suggestion. I would also object to their not being discharged, but assuming they are not going to be, they should be kept in sequestration wholly and separately apart from the other jurors.

The Court: I think that is true.

Mr. Masin: Whether it means another hotel even is to be considered.

The Court: Well, I would like to avoid that. That means another marshal.

Mr. Masin: They would need a separate marshal for them, anyhow, because they are not going to [157] be with the others. If they are sequestered, they have to have marshals with them at all times.

Mr. Evans: The Marshal's Service can handle that, Your Honor. They will have every bureaucratic excuse in the world, but this case is much more important than that, and I will guarantee you that you may hear complaints, but on behalf of the United States, I would request you ignore them and request that they be provided by what is proper from a legal standpoint.

The Court: Well, I want to protect everybody. So what I am going to do is direct that they be removed to

another floor; that they be continued to be sequestered, at least for now.

I do not think it would be right to keep them out, for example, for two weeks if this jury stays out for two weeks.

At some point I am going to revise my view as to them, but at least for a limited period of time I am going to keep them, and I am going to keep them sequestered.

All right. So much for that. They will be sequestered separately.

Mr. Evans: Now, with regard to that, Your Honor, we would request that the Court advise them of that.

[158] *The Court:* I will.

Mr. Evans: Now, there was another problem that was raised.

What I meant by the Court, would the Court do it, and not the Marshal?

The Court: Yes. I will let them know right now.

* * *

[160] *The Court:* Marshal, did you have something to report?

The Marshal: I want you to clarify the instructions as to the alternates, Your Honor.

The Court: All right. What I want to do is this: I realize that it may present some inconvenience, but we are going to have to do it this way:

I want to keep them sequestered for a little period of time, but I want them on another floor, and I do not want them to be in contact with the deliberating jurors.

I will let them know when they will be discharged from their attendance on the court, but for a brief period

of time — and I haven't determined how long — we are going to keep them in attendance.

The Marshal: All right.

The Court: You will take care of that?

[161] *The Marshal:* Yes, Your Honor.

The Court: Fine. Thank you.

The Marshal: No problem.

Mr. Mahon: Judge, to revisit that problem, I don't understand exactly what he is saying.

The Court: Excuse me, Mr. Mahon. Do you want me to tell these folks that? Will it make that better? How about you, gentlemen, do you want me to do that, or may the marshals do it?

All right. You go ahead and take care of it, will you, please? Go ahead, Mr. Mahon.

* * *

EXCERPTS FROM TRIAL TRANSCRIPT
August 14, 1979

VOLUME 101

[123]

* * *

(Jury present at 3:27 p.m.)

The Court: I have a question—not a question—a statement from Mrs. Harachiewick, and it is that "For the record, we request to see the Judge."

All right. Mrs. Harachiewick, I am here.

Juror Harachiewick: Okay. We had in deliberating—we had a statement made there in deliberations that we have a question about—it was on one of the defendants—

The Court: I would rather you did not tell us anything about any of your deliberations.

If you have a question that relates to law or facts, what I would appreciate your doing, because, you see, we are not privy to what you are doing.

Juror Harachiewick: No, sir.

The Court: I want it to stay that way.

Juror Harachiewick: Okay. It isn't pertaining to that.

The Court: Okay.

Juror Harachiewick: It is pertaining to information that should not have been available to us. It [124] is pertaining to a defendant that is no longer with us.

The Court: Well, I think that I can solve that problem—

Juror Harachiewick: Okay.

The Court: —right now.

First, I assume, when you say "information," you are talking about what one juror may have said to you?

Juror Harachiewick: That is correct.

The Court: His or her conclusions as to—

Juror Harachiewick: No, sir.

The Court: This is from the newspapers?

Juror Harachiewick: Yes, sir.

The Court: Well, now—

Juror Harachiewick: Our news media; one news media. I'm not sure which.

The Court: I beg your pardon?

Juror Harachiewick: It's from a news media of some source. I do not know which.

The Court: Well, now, I have asked you each morning to advise me as to whether or not there was any information received by any juror at any time. I had not heard any such information.

Mr. Evans: Your Honor, may we have a little short side bar?

The Court: Yes; certainly.

[125] (Side bar conference between the Court and counsel:)

Mr. Popper: Your Honor, may I suggest the jury be taken out if there is going to be a large discussion on this. There may be.

The Court: Well, let's first have a small discussion, and then if we need a large one, we will proceed from there.

Mr. Kogen: I would request the jury be taken out. One of the jurors is pretty close to crying. I have a

feeling it may be that she is the one that may have said something.

The Court: Which one?

Mr. Kogen: It looks like Mrs. Loescher.

Mr. Levin: She is upset.

Mr. Kogen: I can't remember her name. I think they ought to be excused, because she is close to collapse.

The Court: All right.

(Side bar conference concluded.)

The Court: Marshal, would you take the jury out, please.

(Jury excused.)

* * *

[129] *Mr. Evans:* Your Honor, on the end of the note, could the Court also indicate that the jurors are not to discuss this matter at all?

The Court: Yes.

Mr. Rosen: And the case itself, not just this matter. I would ask the Court to instruct them to stop deliberating.

The Court: Yes.

Mr. Rosen: Looking at exhibits, or anything.

Mr. Levin: Your Honor, may I speak to Cecil for one moment?

The Court: Yes, sir.

All right, gentlemen. The note reads as follows:

"Dated 8/14/79, Mrs. Harachiewick:

"Before we go further, would you, please, write in a note to me:

"1. Name of the juror who provided the information about a defendant not in court.

"2. The information provided.

"3. The defendant about whom the information was provided.

"4. Finally, please hold up further deliberations until we get the note and advise you further."

[130] *Mr. Matthews*: Judge, may I suggest you also ask the source of the information of the juror who provided it?

Mr. Evans: Well, I think the problem is if we start doing that, then the jurors are going to be probing further into matters that I would ask the Court to add to the note, telling them not to talk about the matter.

The Court: Yes, that's true.

Mr. Popper: Your Honor, may I suggest something?

Mr. Evans: If Mrs. Harachiewick could be told in the note—and I don't mean to interrupt Mr. Popper—to be told in the note to rely only on what is known to her at this time.

In other words, she should not inquire of the juror for information. Just put down everything she is aware of.

Mr. Popper: Your Honor, may I suggest that we also inquire as to whether or not this person merely told the foreman or the jury in its entirety?

Mr. Kogen: That's right.

Mr. Popper: It is something we can surmise. We have to have the answer.

Mr. Evans: I think if we get the information the Court has requested, the Court can determine then what [131] further inquiry is necessary as to who else knows, when and where, but I think we absolutely need this right now in order to decide anything.

The Court: I could add how many of the jurors are aware of this information.

Mr. Kogen: That doesn't mean it is in evidence. That means they are aware from reading the same article, or whatever.

The Court: Yes. All right.

The P.S. on this then is:

"Please don't discuss this situation further among yourselves. How many of the jurors were advised of this information?"

Now, that is clear, I think. All right.

Cecil, if you would, please, sir. Let's be in recess until we hear from the jury.

(Recess taken)

(Jury not present)

The Court: All right. Let me read to you the answer:

Now, to the four questions that I asked, the first, number one, "It is Mrs. Arrington."

No. 2, "The Defendant was acquitted due to not enough evidence."

3. "Reverend Jackson."

[132] 4. "Apparently she told all twelve."

Okay. Gentlemen, comments.

Mr. Popper: Judge, I think that the first question of the Court has to be whether or not this in any way would tend to affect their deliberations or their verdict.

Mr. Kogen: No, I don't think it even goes that far. I think we are subject to a mistrial right now. I am sure that they are not going to say it is going to affect them. That doesn't help us at all.

Mr. Tarkoff: Your Honor, for the record, I would move for a mistrial based on the statement that the Court just made concerning what the jurors said, their awareness of the situation of Mr. Jackson.

The prejudicial effect, I believe, could be that the jury apparently believes that the Court acquitted Mr. Jackson because there wasn't enough evidence, and what is the corollary for those of us that are still here, that there is enough evidence that Your Honor has acquitted the innocent ones and now the guilty ones are still here for them to deal with.

I don't think there is any instruction that can cure the prejudice from the knowledge of what happened to Mr. Jackson, and I respectfully move for a mistrial.

* * *

[135] [*Mr. Evans:*] Now, this lady, who apparently has totally disregarded the Court's orders, has not only acquired information from the newspapers, but seen fit to publish the information to the other jurors. She really ought to be held in contempt.

Mr. Kogen: Who is the juror, anyway?

The Court: Mrs. Arrington.

We ought to seriously consider whether or not she should remain as a juror.

Mr. Levin: Your Honor, that would seem to be the only problem that should hang us up. With all due respect to Mr. Evans, from the demeanor of some of the jurors, when the information was first conveyed to the Court before you got this note, it seems as though some of them were upset.

The Court: They are very upset.

Mr. Levin: And it appears as though what is hanging over their heads is perhaps what has occurred is going to make this six-and-a-half months all for naught, and I think we would urge on the Court to deal with the matter right now.

The Court: I am going to deal with it right [136] now. The only question I have in my mind, gentlemen, is whether or not Mrs. Arrington ought to be discharged as a juror and replaced by an alternate.

Mr. Evans: Well, Your Honor, I haven't researched the law, even with respect to whether the Court can do that.

The Court: I haven't, either.

Mr. Evans: At this stage, and before the Court does that, or we see fit to do that with respect to Mrs. Arrington, I certainly would like to have the opportunity to research it and research it very, very carefully.

I think that once she is gone, if that, in fact, aborts the entire proceeding, there may be no alternative.

The Court: Well, that is true.

Mr. Tarkoff: Your Honor, first of all, I don't believe that Your Honor can do that, but just for the moment, to assume arguendo that you could, I think it would be like locking the barn door after someone stole the horse. I mean, she has told the other eleven. Everybody has the information.

The Court: That, we can take care of. I am convinced of that. The question is whether or not this juror, who has seen fit to disregard the Court's orders, ought to remain.

[137] **Mr. Popper:** May it please the Court —

Mr. Kogen: That is the very reason we should have a mistrial, Judge.

The Court: Well—

Mr. Kogen: Now, I don't want to go through six-and-a-half months again any more than anybody else, but my main concern is my client.

The Court: I understand.

Mr. Kogen: My main concern is being protected in every way, and the problem we have had from the beginning, I think there were other times we had motions for mistrials, which I thought were well taken, but I think that what has been weighing us down all the time is we went two months, three months, four months, and every time that's happened, I think my client's rights have been dissipated, and what has happened here scares me, because here is one juror who is disregarding the Court and said things to the eleven jurors—how do I know the other eleven are telling the truth and haven't read an article at this stage?

I mean, we have to assume things we should't be assuming.

The Court: We cannot presume any such thing as far as the others are concerned because, for one thing, they have quickly told us about this problem.

Mr. Rosen: Your Honor, of course, we don't [138] know and we can't very well find out, without invading some of their discussions, but in what context this conversation came up, whether it came up in the very light or posture that Mr. Tarkoff mentioned, that we know Reverend Jackson was found not guilty because there wasn't enough evidence, so these others must be guilty.

Mr. Kogen: To go one step further and assume Harrington was found not guilty—

The Court: It could be absolutely the converse, too. She could be using it as an argument for the acquittal of people because he was acquitted.

Mr. Kogen: We can't take that chance, Judge, is what I'm trying to say.

The Court: We aren't going to take any chances. I am going to examine the jury when they come in.

I am going to assure you, gentlemen, there is no point in a lot of eloquence at this time to try to convince me that we ought to have a mistrial, because I am convinced that we ought not to have a mistrial. I am going to instruct the jury. I am going to do the best I can, and we are going to move on.

I am not going to discharge Mrs. Arrington, nor am I going to castigate her. That would be counterproductive, if I am going to leave her on the jury.

Mr. Popper: Your Honor, as far as this lady [139] remaining on the jury, apparently at this point in time she has some feeling, whether it be prejudice, pro or con, as to the fairness of the trial because she wanted to dispense to the rest of the jurors her knowledge from the media of what occurred.

Now, to give a fair trial, that's an impossibility with this lady on, and, Judge, if you cannot discharge her, I think it is your duty to declare a mistrial, and if you can't, that's something else. But, if you are going to have somebody who felt strong enough to disobey the Court's orders and leave them on, when they violated that, what makes you think they are going to follow your orders any more or try to taint the jury any more than they already have?

If that be the case, Judge, we may be down at the end of the line, but it just means we are going to do it again, anyway.

The Court: Well, I don't think so.

Yes, Mr. Rosen.

Mr. Rosen: We don't know how many more articles Mrs. Arrington has read, and I don't think this Court can rely upon her to tell the Court, because the Court inquired every day, and she did not disclose this and, therefore, we can only assume that she has been reading.

The Court: Well, what is your recommendation?

[140] *Mr. Rosen:* I submit, Your Honor, that this woman, Mrs. Arrington, be disqualified, withdrawn as a juror and, of course, I object to an alternate replacing her, on the basis of I don't think the Court has the authority to do that, but if the Court sees fit to do it, that is the Court's management of the trial.

I disagree, but, nonetheless, I don't think this woman can be depended upon to affirm or deny whether or not she has read other articles.

The Court: Did you want to say something, Mr. Matthews?

Mr. Matthews: Yes, Judge.

I to a point agree with Mr. Rosen, but I don't think discharging her solves the problem at all because of the manner in which your question was answered. She just didn't say that Reverend Jackson was not out of the case. She said that he was out of the case because there wasn't enough evidence, and the implication of the other people still being here has to be from the Judge who has presided over this trial, who is all-knowing, who rules on objections. That is your position, Judge.

The Court: I understand.

Mr. Matthews: So far as the jury is concerned.

The Court: I understand.

Mr. Matthews: And if you feel that there was [141] enough evidence, regardless of the fact that we know it is a legal matter, they cannot help but believe, no matter how slight, that there must be sufficient evidence, or these people would be right where Reverend Jackson is.

The Court: Well, let me say this, gentlemen: I think we can remedy the situation, but if we can't, then it is going to be up to the Fifth Circuit Court of Appeals to do so.

Mr. Rosen: What about the position regarding Mrs. Arrington herself?

The Court: I think we will pass that until tomorrow, and I am going to resolve the problem tonight so the jury feels better about it, and if we are going to withdraw her, it is going to be quickly and without any fanfare, but we are going to spend the night on that.

Mr. Rosen: The Court is going to direct them not to conduct any further deliberations tonight, though?

The Court: I understand they are upset. I am going to try to calm them down and get them back on the track and question them about this situation and then let them go home, and then overnight we will decide what to do about Mrs. Arrington, but, yes, there is no point in taking any more of your own valuable time on the question of whether or not we ought to have a mistrial.

[142] **Mr. Popper:** Judge, may I ask one thing of the Court?

The Court: Yes, sir.

Mr. Popper: That when you poll the jury, you ask whether or not this has in any way affected their open and free minds.

The Court: I will.

Mr. Tarkoff: Could Your Honor give us a preview of the—

The Court: Do you have something, Mr. Levin?

Mr. Levin: Well, Your Honor, I think that before—well, that inquiry may be correct at this time, but I think that right now what the Court intends to do, that is to soothe some of their feelings right now is the important thing and the proper one for all of them at this time, and then we would urge to let it go at that, and we have the evening and early morning to decide what is the most appropriate procedure after that.

Mr. Rosen: And I would also ask for leave to supplement the record with a court exhibit of the publicity.

I guess we will just have to start gathering together all the publicity that attended the trial for the past six and a half months.

There was a hiatus where nothing was going on.

[143] **Mr. Evans:** Your Honor, in terms of any voir dire of the jurors individually or together, I would request that the Court take swift and appropriate remedial action in terms of the instructions this evening, and any further voir dire of individual jurors, or even as we understand taken in the morning, if that seems to be appropriate in the morning—

The Court: Well, I want to get this immediate problem solved right now.

Mr. Tarkoff: Your Honor, I am just not sure about the procedure of asking jurors what is affecting them while they are in deliberations as opposed to the sort of questions we asked on voir dire.

Therefore, at this point I would object to the Court, I guess, taking the safe tack and would object to the Court

polling the jury and asking them questions about what is affecting their deliberations.

I would ask if the Court could give us a preview of the instructions or the admonition that you intend to give them.

The Court: I am simply going to ask them, in terms that I am not absolutely sure of right now, but essentially if they recall my instructions, that they were not to consider, guess or speculate as to why any of the defendants were or were not present, and now they know why [144] one of the defendants is not present, and I am going to instruct them again that they should not consider that in any way.

They should strike it from their minds. It should not bear in any way upon their deliberations in this case, and is there any one of them, who under the present circumstances, is unable to follow that instruction.

Now, gentlemen, we may have an abortion of the trial right now, and if we do, that's the way it is, but it is something we have got to know, and if they say that, "We can go on. We all can try the case, we can strike it from our minds," then we will proceed, and, you know, it is not all that complicated.

Mr. Evans: I would just request that in the admonition concerning the fact that they are not to consider in any way Reverend Jackson not being before them, that the Court make that a direction of the Court.

The Court: I will.

Mr. Evans: And ask if there is anyone that cannot follow that as a direction of the Court.

The Court: All right. Cecil, would you bring the jury in, please, sir?

Mr. Evans: Your Honor, if there is any affirmative response, if the juror could just raise their hand without saying a word, then perhaps we can deal with [145] that situation further individually.

The Court: Yes.

Mr. Tarkoff: My objection is being overruled?

The Court: Yes, sir.

Mr. Rosen: And the Court has reserved ruling on Mrs. Arrington?

The Court: I have.

Mr. Rosen: On the motion to strike her?

The Court: Yes, sir.

Mr. Levin: The alternates are still sequestered, are they not?

The Court: Yes, sir.

(Jury present)

The Court: Ladies and gentlemen, I have the response to the note that I sent in. It would appear that Mrs. Arrington was possessed of certain information from reading the newspapers.

Is that correct, Mrs. Arrington?

Juror Arrington: No, sir.

The Court: How did you get that information? Somebody told you?

Juror Arrington: Yes.

The Court: Somebody on the jury, or elsewhere?

[146] **Juror Arrington:** No.

The Court: Somebody mentioned it to you?

Juror Arrington: Yes.

The Court: I see. And the reason for it, and that it involved Reverend Jackson, and that you had mentioned this to the other twelve during the deliberations?

Juror Arrington: Well, it just slipped out, Your Honor.

The Court: All right.

Juror Arrington: I didn't intend to say it.

The Court: I understand. I am not here to criticize anybody. I want to ask you some questions, and I want to ask these of all of you.

First, I want to tell you all to relax and settle down and not be upset with each other, because that is not what we are here about. Those problems happen, and it is our function to try to solve them the best we can.

As you may recall, I have mentioned to you several times during the trial of this case that the presence or absence of any defendant, as the case proceeded, is something that you should not consider. It is something that you should not speculate about or give any consideration to. I am sure you all recall those statements.

Now, I want to tell you that that is the law. That is the way it should be because on the basis of legal [147] factual reasons which do not concern you, it was the determination that what you heard about should be the case.

Now, that has absolutely nothing to do with your deliberations one way or the other; nothing at all.

Does each of you understand that? Do you all understand that?

Juror Loescher: I don't believe Mrs. Arrington does.

Juror Arrington: I do.

The Court: Do you understand that, Mrs. Arrington?

Juror Arrington: Yes, sir.

The Court: I will ask you directly: Do you understand that?

Juror Arrington: Yes, I do.

The Court: All right. Good.

Now, at no time, at no time should you give such a thing any consideration in this case. The only matters that you are to be concerned about are those matters which pertain to these defendants present, the evidence in the form of exhibits, the witnesses, the charges and the relationship of those items, those ~~eons~~, those things to each other, not who is or is not here and not what may have happened that somebody read in the newspapers that somebody inadvertently mentioned to somebody, and I am not [148] attributing any blame to anyone.

That is an unfortunate accident that happened, but the important thing is that I make absolutely clear to you, because we have been at this so long, that I make absolutely clear to you that something like that is to have no place in this case whatsoever.

Do you all understand that?

Now, is there any one of you—is there any one of you who, because of what has occurred this afternoon, feels that they cannot put that out of their mind and try this case fairly as to all parties?

All right. Let me be even more specific.

Mrs. Loescher, can you put that information out of your mind and try this case on the evidence?

Juror Loescher: Yes, I can.

The Court: Thank you, ma'am.

Mr. Rappel, can you put that information out of your mind and try this case on the evidence that is before you?

Juror Rappel: Absolutely.

The Court: And in connection with the parties that are before you, can you?

Juror Rappel: Sure.

The Court: All right, sir.

Mrs. Arrington, can you put that information [149] out of your mind and try this case only on the evidence and only in connection with the parties that are before you?

Juror Arrington: Yes, sir.

The Court: All right.

Mr. Kennedy, how about you, sir?

Juror Kennedy: Yes, sir.

The Court: Mrs. Rollins, can you do that?

Juror Rollins: Yes, on the evidence.

The Court: On the evidence and the evidence alone in this case, can you do that, Mrs. Rollins?

Juror Rollins: Yes, on the evidence; yes, as long as it's there.

The Court: As long as it is there. Whatever is there, you will try it in connection with what is before you in terms of the evidence and testimony, and not on the basis of something such as you just heard; is that correct, or is it not correct?

Juror Rollins: That's correct.

The Court: All right.

Mr. Russell, how about you, sir?

Juror Russell: Yeah, I can.

The Court: Any question in your mind?

Juror Russell: No.

The Court: All right, sir.

Mr. Pratt, how about you, sir? You can try [150] this case solely on the evidence?

Juror Pratt: Solely on the evidence.

The Court: All right, sir. Thank you.

Mrs. Olafson?

Juror Olafson: Yes, sir.

The Court: Mrs. Harachiewick?

Juror Harachiewick: Yes.

The Court: Mrs. Fuentes?

Juror Fuentes: Yes.

The Court: Mr. Zemba?

Juror Zemba: Yes, sir.

The Court: Mrs. Spires?

Juror Spires: Yes, sir, I can, Judge.

The Court: All right. Thank you all.

Gentlemen, does anyone want to see me at side bar before I let the jury go?

Mr. Popper: Yes.

(Side bar conference between the Court and counsel:)

The Court: Make it soft, now.

Mr. Popper: No. 1 and 3. No. 1 made the comment that she could not believe No. 3.

The Court: She didn't say that.

Mr. Popper: Would you read it back, sir. I believe she made the comment that the other counsel heard, * * *

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* * *

Mr. Rosen: What is the Court going to do with the alternates that are sitting around at this time? Anything?

The Court: At this point, gentlemen, I propose to keep them about one more day, and if this jury gets back on an even keel, which I think they may be at this juncture, I am going to discharge them.

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EXCERPTS FROM TRIAL TRANSCRIPT
August 15, 1979

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[22]

* * *

The Court: I will do that note right now.

Mr. Popper: Is there any other planned meeting, Judge, between now and the verdict?

The Court: No. I hope they are going to settle down, now I have gotten their 12-line legal accounting sheet.

(Whereupon, the following took place in open court)

The Court: Alternate jurors, the purpose of bringing you in here is, first, to let you know that we are going to discharge you and, of course, secondly to thank you very much for the service that you have given us.

I think you are entitled to an explanation, though, as to why we kept you as long as we did, and I will say, without more, that the occasion almost arose for your use, but it did not.

I think whatever problems we have had are past, and we simply cannot keep you waiting indefinitely.

I do not know how long the jury is going to be. I have a feeling, from what we have seen and heard, that they are going to be a while. So I do want [23] to discharge you, but I want to still, in the interests of caution, ask you not to read the Press.

You will be going back to Naples, Mr. Clem?

Juror Clem: Yes, sir.

The Court: You will be going back to your home—

Juror Clem: Yes.

The Court: —which is South Miami?

Juror Clem: That's right.

The Court: I want you still, because this matter is being covered in the Press now, in the last several days almost daily, I want you to avoid the Press and television coverage in the slim possibility that we might still call you. That's all. That is the only restriction that I am going to ask that you observe; otherwise, do what you want to do.

I will ask you not to go on vacation yet. I would like you to not leave the State until the jury has returned, which again is somewhat of an imposition, but I am going to ask it of you.

If you have any problems, any family problems in that regard, any emergencies of any kind, please let us know and we will work it out.

So with that, and in view of your [24] excellent service over the past six and a half months, I , and I am sure all counsel,—and I will say it, because I think under the circumstances they would want to express themselves, but I am not going to let them express themselves. I am going to say on behalf of myself and all counsel, not only the counsel here, but counsel not present, we greatly appreciate the service you have given this District, and if we do not see you again, I want you to know how much we do appreciate that.

So I will excuse you, and I will take the opportunity to shake your hands and let you go. Thank you very much. You may go now.

Mr. Rosen makes a good point:

We will be in touch with you as soon as all is clear, because I will just ask you not to read or listen to the news. So you will not know, and we will let you know.

I do not think you ought to be talking to any newspaper reporters and, of course, do not discuss the case until it is over either with your families or with anyone else.

Thank you very much.

(Alternate jurors excused)

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EXCERPTS FROM TRIAL TRANSCRIPT
August 20, 1979

VOLUME 104

[2]

* * *

The Court: Gentlemen, perhaps it's editorializing and it's not a good idea lest I give you any thoughts that are unnecessary, but I think we have a serious problem.

Now, there are statements that are not really questions that I got this morning. I will read them to you in the order that I read them.

First is from Mr. Zemba and it says: "Judge William Hoeveler, August 19, 1979."

I believe that was yesterday.

"Your Honor, keeping in mind, not to mention anything pertaining to this case, yet remembering the importance of it, I felt this letter is necessary in that it has direct bearing on my ability to perform my duties as a juror to the best of my ability. I realize the importance and the necessity of all decisions which have placed me in this situation, however, I do not feel it necessary that I be treated as a second-class citizen because of my present status, i.e., being called stupid for being on this jury by an employee of the Marshal's Office. Sandy Jackson has shown special treatment to a special group on this jury—"

That's the day shift lady.

"—and total ignorance of others. (One incident having a direct bearing on my wife.) While [3] Marshal Ed, last name unknown, has overstepped his authority to a point where I feel like a criminal at times. Incidents may be documented if requested. As

you can see, this is a typewritten letter. I have been told there is a question as to whether I may have this. If I am—"

I am sure he is referring to the typewriter.

"If I am in error as to your decision, I stand corrected. I do wish to complete a paper on southern politics which I have already started. I have delayed my paper on this trial until its duration. Please advise. If there are any questions relating to this letter or its content, I would be willing to explain in full detail.

"James T. Zemba, Juror Number 11."

Okay, that is item number one.

Item number two, which some or all of you may have heard, pertains to Mrs. Loescher. Now, on Friday, I guess it was Friday.

Cecil, was it Friday we first heard about Mrs. Loescher?

Mr. Miller: Yes, sir.

The Court: The word came to me through the Marshal's office that Mrs. Loescher was acting strangely. Strangely, I think, for anybody from what [4] I have subsequently heard.

I passed it by because I was also advised that it was the anniversary of her mother's death.

Cecil, is that correct?

I am referring to Mr. Cecil Miller who is also in the room, United States Marshal.

I hoped that it would pass. I got a letter, a memo I should say, from Mrs. Harachiewick on 8/17/79 which was Friday at 1:40 p.m.

The first advise was not by virtue of a note but was a report from the Marshal that she was acting strangely.

The note reads as follows:

This is 1:40 p.m. Now, I had gone to the dedication of the building in Fort Lauderdale, so I didn't get back in the office until almost, I see here, 3:50 p.m.

The note is:

"Due to the condition of Juror Dorothy Loescher, in her best interest, we are requesting to adjourn for today and return Monday at nine a.m. We will monitor her condition over the weekend."

That is Mrs. Harachiewick. It is signed Marjorie J. Harachiewick.

[5] On 8/17/79, I think I did tell you. As a matter of fact, I think you were here for that when I wrote an answer and told them that they could take Saturday off.

Mr. Tarkoff: Mm-hmm.

The Court: I was mindful at that time of the information that I had received without a note during the morning and I thought that would be the discreet thing to do.

Mr. Kogen: Would you tell me which one is that?

The Court: She is Number 1.

Mr. Kogen: That is the one I pointed out to you that I thought was having a breakdown and she was pretty close to tears. If that is the same one—

Mr. Matthews: It is.

Mr. Kogen: That is the woman in here by herself at the beginning—

Mr. Tarkoff: With the dirty windows.

Mr. Kogen: She is the one that you had us at side bar and I said, "I notice this juror is having what appears to be a nervous breakdown."

The Court: She is the lady that talked too much on voir dire.

Mr. Kogen: That's right.

[6] **The Court:** I was mindful of the report the Marshal gave me. I thought that, coupled with the fact that it was the anniversary of her mother's death, this would subside over the weekend.

I will read you—I haven't read Mrs. Harachiewick's. I read the one 8/17/79.

My response on 8/17/79—

Mr. Rosen: Was that the total note that they would monitor her condition over the weekend?

The Court: Yes.

My response note on the same piece of paper:

"8/17/79. Mrs. H., perfectly okay. If she needs medication or medical attention, please let the Marshal know. I hope with some rest and change of scenery all of you will benefit."

That concluded Friday afternoon's communications.

Now, this morning, in addition to Mr. Zemba's note that I have just read to you, the following note came from Mrs. Harachiewick.

"Judge Hoeveler, 8/20/79. I have reached the conclusion, after observing and talking with Mrs. Loescher this weekend, that she should seek professional help. I feel that her husband should be [7] contacted."

It is signed Marjorie J. Harachiewick.

I got this note at 9:45 a.m. from Cecil Miller. I did nothing about it except to call this meeting. At first I scheduled it for 2:00. Then I did nothing about it and got another note which—

Cecil, I believe you brought this in also?

The Marshal: (Indicating affirmatively)

The Court: This is 8/20/79.

"We are unable to resume work until an answer is provided. I would be willing to discuss it if necessary.

"Marjorie J. Harachiewick."

I responded as follows on the same note:

"8/20/79, Mrs. H., I cannot proceed to get professional help until I get the lawyers in and present the situation. I will, of course, get such help, but I must advise all counsel of the situation. I appreciate your problem and the consideration you are giving it. I was hoping you would continue working until two p.m.

"W. M. Hoeveler, 10:30 a.m."

Now, I have done nothing since that time. That's it, gentlemen.

Mr. Rosen: May we have some kind of information, Your Honor, as to what the Marshal's [8] observation of Mrs. Loescher are?

The Court: Yes, certainly.

Cecil, without going into anything that you might have or your people might have overheard about the position of any of the parties, including Mrs. Loescher, vis-a-vis government or defendant, because I don't think we should be privy to that, what are the observations that you and your people have made regarding her condition?

The Marshal: Okay, sir.

She does not have any concentration span or ability to discuss the case with the other jurors, to participate. She seems to think that someone is telling her things to do and most of them have nothing to do with the case whatsoever. She is really not concentrating on the case.

She thinks the Lord is talking to her. She also thinks Lucifer is after her. That at one time she made the statement that she was Jesus. Another time she made the statement she was Moses. But, she doesn't seem to have the ability to concentrate on the matter at hand at all at this point.

Mr. Popper: Judge, if that be the situation, if we have to go for help, I assume medical help, psychiatrically—

[9] **The Court:** She's got to have help. We have one thing that I venture as important or perhaps even more important than this case, and that is a lady who may go into an absolute psychotic state.

Mr. Popper: At this point in time, I move for a mistrial. We don't have 12 jurors able and competent to rule on this case.

The Court: Well, I'll take that one under advisement. I think that may be a little quick.

Mr. Tarkoff: Your Honor, my feeling is by what the Marshal has told us, it sounds like some sort of psychological psychiatric problem and I think a mistrial may be the only solution available to us.

Of course, I would make such a motion, the reason I say that is to give some sort of psychiatric help, obviously it's going to be somebody talking to her and talking about the pressures upon her and in essence we have an outside influence on her. It is obviously going to affect the way she is deliberating and, you know, it's almost a Catch-22.

And so, respectfully, I would move for a mistrial based upon this.

The Court: Let me throw in, and then, please, make whatever statements you would like. Let me throw in another possibility.

[10] I think there is some feeling between some of these jurors, I would not suspect however that Mrs. Harachiewick who sounds like a pretty good person would be part of any ill-considered recommendation as far as this woman is concerned.

The possibility that she is using for whatever—I don't know how to figure this woman.

Mr. Rosen: Except the Marshal made his own observations, Your Honor.

Mr. Evans: I would like to know which deputy—

The Court: I think Cecil himself observed some of this. Is that not so?

The Marshal: Yes, sir. Both the female marshal, Sandy, and the marshal Ed have, I gather, made the same observations.

Mr. Evans: Has any effort been made to contact the lady's husband?

The Court: This morning and Cecil did and I asked him to contact the husband and ask some questions, whether or not she was under medication, whether she had had any previous condition, was she under the care of a psychiatrist or psychologist.

Tell us what you and he said, Cecil.

The Marshal: I had asked him, I told [11] him she wasn't feeling too well. I didn't want to alarm him but we needed to know if she had been on any medication prior to this time that she wasn't receiving or didn't

have with her or if she was under the attention of any physician or psychiatrist. That she seemed to be a little mentally off-balanced and hallucinating to some degree.

He said she had not been taking any medication nor was she under any psychiatrist's attention or physician and had never had any trace of mental disturbance.

Mr. Evans: Could I inquire further, Your Honor? I understand that this weekend that the jurors were being permitted to meet with members of their family.

The Court: That's right.

Mr. Evans: Was any effort made, prior to this morning, to contact Mr. Loescher so that he would be aware that that opportunity was available to him and if so, did he in fact see her over the weekend?

The Marshal: He did visit with her on Friday evening.

Mr. Levin: But neither Saturday or Sunday?

[12] **Mr. Miller:** As I understand it, that's true.

Mr. Rosen: This woman does have, as I recall voir dire, has a background in nursing in psychiatric wards.

Mr. Levin: That is correct.

Mr. Rosen: That is my recollection on voir dire.

The Court: Mr. Varon, you had something you wanted to say?

Mr. Varon: Before I make any statement, I would like to inquire. This authority to let the sequestered jurors meet with members of their family—

The Court: That was mine.

Mr. Varon: That wasn't by agreement of counsel?

The Court: No, sir, and the reason I did it was because they requested it. And, I assume they were in-

structed in accordance with the instructions I gave the marshal.

Mr. Varon: As to that, Your Honor, I think most respectfully, that was improper. It violates the spirit and the order of sequestration. So, I move for a mistrial on that ground. But—

The Court: Let me deal with that first.

[13] I'll deny the motion on that ground as there is no evidence whatsoever that there was any problem created by that.

Your next motion?

Mr. Varon: What Your Honor has said is not applicable on the stated facts. An unauthorized communication with the jury and not reporting anything to counsel and in addition, as I said before, violating the spirit of the sequestration.

The Court: That motion is denied.

Mr. Evans: I think the record should reflect Mr. Varon, of course, hasn't been here. All other counsel were aware—I know we certainly were—and I have the understanding that all other counsel were aware of the fact that they were permitted to see family members even the prior weekend. I don't know whether that occurred.

The Court: They didn't see any the prior weekend.

Mr. Rosen: To the contrary, Mr. Evans—

Mr. Evans: I was not aware of any ban of any sort with respect to that, with respect to visitation. As I—

The Court: It's unimportant because I made that decision and I made it based on the facts.

[14] **Mr. Varon:** What is important is that Mr. Evans made the representation that other counsel was aware.

Mr. Rosen wasn't aware. Mr. Kogen wasn't aware. Mr. Matthews and Mr. Tarkoff and nobody in my office was aware.

Mr. Kogen: I want to ask one question to get it on the record.

I want to know how Mr. Evans became aware of this. How did Mr. Evans know they were meeting with the family?

Mr. Levin: I think we had the feeling that the fact they were going to have the weekend off. We may have mentioned that in chambers with other counsel present. The Court may have speculated on seeing family.

Mr. Evans: I can recall particularly where any information came from. I talked to the Court's law clerk late in the day to see what was going on, and Mr. Robertson, the law clerk with whom I spoke, indicated the jury was not going to be deliberating any further and that Your Honor had indicated that they could say hello or meet briefly with members of their family over the weekend.

The Court: Gentlemen, let's take one thing at a time.

[15] **Mr. Varon:** What I object to is Mr. Evans making the positive statement, "Everybody was aware of it."

Mr. Popper: I do remember we met here on Friday. One person sent a note in and asked if they could say hello to the wife and on that occasion, you asked us and we said you could say—

Mr. Matthews: That was the lady who said, "Can I shake hands with my pastor." That was Mrs. Spires and also visit with her family.

The Court: Now that you mention it, I think I did raise that point and I don't think there was any objection to it.

Mr. Matthews: That was a note.

The Court: In any event, let me say this for the record: So the record will be abundantly clear, this is a jury that has been sequestered since Wednesday, ten days ago, now closer to fifteen days ago.

Mr. Miller: It was the 8th.

The Court: The 8th. I instructed Cecil, upon their request, I think there were other jurors that wanted to see their family, that they could; that the marshals were to stay in attendance but not to monitor their particular conversations.

I felt it was a proper thing to do in [16] view of the service they had been rendering and particularly in view of the tenseness of the situation. It was a considered judgment on my part.

The jurors and their visitors were to be instructed by the marshals as to the content of the conversation and I trust that was done.

Is that correct, Cecil?

The Marshal: Yes.

The Court: That is the way it came about and the way it happened.

If you wish to, I will give any of you full opportunity to develop it. I am going to deny that motion.

Mr. Varon: Coming back to what I was starting to say, I move for a mistrial on behalf of my client, Vanderwyde, on the basis of what Cecil Miller stated concerning Juror Number One, Mrs. Loescher.

It appears the lady is hallucinating and to me, in my experience, represents a psychotic manifestation.

I agree with Your Honor that our obligation as human beings transcend the importance of this case because we

are dealing with a human being that is severely depressed and needs medical attention immediately.

[17] I vote for a psychiatrist that Your Honor will appoint to attend this lady immediately, but with certain limitations.

I would want that psychiatrist to report to the Court his opinion as to whether or not this lady is in a position to consult coherently and cognizantly with her fellow jurors, whether she is capable at this state to make a decision, a meaningful decision, or whether she is incapacitated by reason of her infirmity.

If so, how long this infirmity will exist.

Of course, Your Honor, notwithstanding my humanitarian feeling for this lady, I persist in my motion for a mistrial.

The Court: Mr. Matthews?

Mr. Matthews: It seems we have a note from everybody except Mrs. Loescher, and I don't know what the consequences of your taking it upon yourselves to have a psychiatrist see her without some dialogue with her.

That might just be the straw that just—because I don't know what her feelings are, whether it's hostility from the other jurors or whether she really might think you are talking to them. That is a possibility.

You are talking to them and everybody is [18] against her and you are doing this for other than humanitarian reasons.

Mr. Evans: The thing that strikes me is, a couple of things:

There is no history of this, evidently.

And, further, her husband who saw her Friday, as I

understand it, there's been nothing to show otherwise reported, no problem, and he did see her on Friday.

And, before we rush to—I'm sort of like Mr. Matthews in respect to thinking that a psychiatrist ought to be called in immediately. I think it would be at least prudent at the outset to have Mr. Loescher visit with his wife, not talk about the case but at least visit with his wife in the presence of a marshal, as has been permitted, and I think properly so already, and determine, at least get an initial determination in that fashion before we rush to the Court bringing her in here and start examining her or before we rush to the appointment of a medical doctor to examine her.

Mr. Varon: By way of medical history, I would like to add, we would like to know for how long she has been in this psychotic or psychiatric state. It may be possible that she may have been incapacitated [19] by this infirmity during the reception of pertinent evidence.

Now, that is also vital.

Mr. Kogen: I would like to make an observation for the record.

From the beginning of this trial, up until this incident that is happening now, I was under the impression, and still am, unfortunately, of Mrs. Loescher that she is very conscientious and was attempting her best to do the best she can. I think she is breaking under the strain of doing the best she can.

Based on no prior history, this trial has done this to her. I believe she should be seen as soon as possible by a psychiatrist for medical help. I do not agree that anybody in the family can go in and talk to her.

If I were a member of the family, I would go along with you. Her health is more important and the husband

would encourage that. That is a possibility I don't want to happen.

Mr. Tarkoff: We are all kind of between a rock and a hard place. What is proper as far as the jury and in the best interest of our clients, at the same time we don't want to sacrifice Mrs. Loescher for this or six months—

[20] **The Court:** Or six months of work.

Mr. Tarkoff: I would have to move for a mistrial and object to her being examined by a psychiatrist and returned to deliberate.

The very essence, he is going to ask her what is causing her problem. If it's any pressure, what is the pressure.

Then we have an influence on the juror, an improper influence being injected into the juror that the Court has to keep deliberating and do the best they can or declare a mistrial.

Mr. Popper: We have another factor.

We have eleven other people who are aware this woman is being removed from the bosom of the jury. For whatever purpose, she is being removed.

Whether they are advised of the medical evaluation, they are sitting back without the opportunity to evaluate the case, to deliberate at all, and one of their members is being removed when they have been sequestered for how long a period of time, we don't know.

And, how that would affect their deliberation, knowing an outside force has been brought in — I have great doubts that they could then, in her presence, come in with a fair and impartial jury.

[21] **Mr. Rosen:** I have an alternate suggestion, Your Honor.

Have all the marshals help furnish the Court with a detailed memo of their observations of her and furnish that to a psychiatrist, explaining to him the process.

We have been in trial six and a half months, she, being very conscientious—she wanted to wash your windows here. I mean all of it.

The Court: I have wanted to do that myself.

Mr. Rosen: That information that came to her with her son and daughter-in-law suggesting maybe you have to look under your car every morning if you're going to be sitting on a trial of this sort, if the Court will recall that also, that incident.

The Court: I didn't recall it, but I appreciate your raising it.

Mr. Rosen: Perhaps without our knowing or the other jurors knowing, her reference to her being Jesus on the one hand and the next moment Moses—

Mr. Tarkoff: She hears voices.

Mr. Rosen: The Lord has sent her in connection with this.

Mr. Levin: Your Honor, it seems as [22] though whatever situation we are in, it's kind of six of one and half a dozen of the other.

I think the two concerns must be this woman's welfare as well as trying to preserve what has gone on for six and a half months.

The only problem that comes out of most of the suggestions is that in any event, the jurors have indicated they can't continue to deliberate until Mrs. Loescher's situation is in some way resolved.

Some of her resolution and help may come from some family support.

I think that may be why it is important for her husband, who knows her better than any of the deputies and any psychiatrist who will see her initially or conduct an evaluation of her initially, her husband should be in touch with her and give us the—probably the best readout as to what her situation is at this time.

Mr. Rosen: If she has hallucinations—

Mr. Tarkoff: I don't see how he could preserve the jury and take care of her. I think it's inconsistent.

Whenever a jury is sequestered and in sequestration—that's the reason I am pressing my motions for mistrial. It's not cruelty. I don't see [23] any middle ground to take care of a legal problem and a medical problem.

The Court: I think there is another dimension we ought to consider. And that is that we don't really know what her condition is.

We are concluding from the fact that she has been heard to make statements that are unorthodox that there is something mentally wrong with her at this time.

I don't know how this lady normally talks. Other than what we have heard out there which was slightly unorthodox, certainly voluble.

One thing I do recall, Cecil, that you said to me Friday night, was her own reference to her condition.

As I remember, you said she said at least she was okay or words to that effect.

The Marshal: Yes, sir.

The Court: That doesn't necessarily mean she is.

Mr. Matthews: No, the last to know.

The Court: But I do think we owe it to your clients, the Government, the Court and to the lady to have

somebody look at her. I don't know enough [24] what her problem is without putting any ideas in her head.

Mr. Rosen: The other side of the coin is if she is hallucinating and in an irrational condition, she may go into a state of remission for an hour or two and then start hallucinating an hour later.

The Court: You say "if"?

Mr. Rosen: What I am getting to, the psychiatrist won't be on the spot —

Mr. Popper: They have to make an in-depth evaluation, Judge, as to the person.

The Court: Let me throw out a couple of suggestions because I don't want to move too fast on this.

Whatever we do, we will have to do this afternoon, but I don't want to go off the edge without giving it some mature consideration.

Mr. Rosen: Do they all have separate rooms?

The Court: They all have separate rooms.

Mr. Rosen: I am concerned about her being alone.

The Court: There hasn't been any suggestion that she is suicidal.

Mr. Tarkoff: If she is in an hallucinary [25] state —

Mr. Rosen: She might hear the Lord to call her to go out the window.

Mr. Levin: We're doing a lot of speculating.

The Court: Let me suggest this, gentlemen: I am not wedded to this idea.

I recognize we have an extremely delicate problem and however we handle it — let me say to you that I haven't passed up the idea of getting Mrs. Evangelist back, taking the lady coming in and starting them all over again.

The idea has not only occurred to me, but we have Mrs. Evangelist standing by, waiting for a phone call.

Mr. Kogen: Judge—

The Court: I realize it's unorthodox.

Mr. Kogen: Of all the jurors, she scares me as a defense counselor more than anybody else.

The Court: I have to take them in order.

Mr. Popper: Hasn't she been under the public influence?

The Court: But under instructions.

Mr. Popper: I think once you have the jury into deliberation, to bring somebody from the [26] outside—

I buy what you say, Judge, it's unorthodox. I think it's complete error.

The Court: But the question is, would I rather have the Fifth Circuit tell me that or start the trial over?

Mr. Popper: We are very concerned about Mrs. Loescher and rightly so. So much as we have failed to concern ourselves with—the Fifth Circuit Court of Appeals is up there but we have a lot of people here whose lives, mental health and otherwise are involved in this trial.

And the jeopardy of a thirteenth juror coming in who in effect has been gone and to go on that, their rights which the law provides, aren't always there for them.

Cost limits the right to appeal. On the retrial, this is all very strong.

The Court: I understand the problems. This is not a procedure that has not been done before. And I recognize the problems incidental to it. There is always the possibility you might win and then what would your position be?

Mr. Popper: I take what I can get.

Mr. Kogen: I am not looking for a new [27] trial or appeal now. I was expecting to win.

Mr. Levin: We have to organize the priorities.

No matter what, I think we have a priority to take care of Mrs. Loescher.

The Court: The first problem is, I am going to the motion for mistrial based upon the requested excusal of a juror.

Gentlemen, I think what I must do is get a doctor in to look at this lady. I am mindful of your feelings, Mr. Tarkoff, and I can't say that you are wrong. I just don't know that you are right.

And I am open to suggestions as to whom we should get to see her.

Mr. Popper: Dr. Alspach.

Mr. Tarkoff: Dr. Stillman.

The Court: Bruce Alspach? He is a good man. I know Bruce Alspach and I have confidence in him. I have known him a number of years. He was a neighbor out on Key Biscayne when I first came here.

Mr. Kogen: I suggest you make a selection without asking us.

Mr. Rosen: How about Mike Gilbert?

The Court: Who?

Mr. Rosen: Mike Gilbert.

[28] **The Court:** He is a very nice fellow.

Here's a statement from Mrs. Harachiewick.

Let the record show that at 1:40 p.m. on 8/20/70, this note came in:

"I request to see the Judge. Marjorie S. Harchiewick."

Mr. Kogen: It's like a TV drama.

The Court: I think we have to see her.

Mr. Kogen: I suggest the Judge see her by himself and, if necessary, call us in.

Mr. Popper: I think we are entitled to have our presence.

The Court: You are entitled, if you wish it. I'll go with whatever all of you agree with. If there is one dissent, we will see her together.

Mr. Kogen: I suggest the Judge see her alone.

Mr. Evans: I at least want one of us present.

The Court: The Government wants to be present. Judge Popper wants to be present.

Mr. Kogen: I withdraw my objection then.

The Court: I think, particularly in this extremely critical stage of the proceedings, we just have to do it together.

[29] So, I would recommend that what we do, there is need to take her into the courtroom. Let's bring her in here.

Mr. Rosen: Are we going to establish any ground rules?

The Court: No questions, unless I ask you to ask them.

Mr. Evans: Your Honor, I would request, before any questions are put to her even indirectly, that we tender them to the Court out of her presence and the Court ask all questions.

The Court: You can write them down and hand them to me, if you wish. We could do that. We can have the marshal take her out.

Mr. Varon: If you please, does she mind having counsel present?

The Court: She knows we are all here.

Would you please bring Mrs. Harachiewick in, Cecil?

Now, while Cecil is going to get her, there is another thing that concerns me:

They may have decided this case as to one, two or three defendants. Now, what do we do about that?

Mr. Levin: The rules provide for return [30] of verdicts as they are reached.

Mr. Kogen: If she's judged by the doctor to be incompetent, we can't poll the jury.

Mr. Tarkoff: Most psychiatrists will tell you they can only tell you her mental state at the time they are with her. And a probability on what it was.

The Court: It depends on her condition.

Mr. Popper: They can tell you what it was at the time of the—

Mr. Varon: How can they tell you at the time of the alleged offense they knew right from wrong?

Mr. Rosen: The way you're going, Judge, you will have to voir dire each juror by a psychiatrist and determine her state of mind during the entire time of deliberation.

That does invade the province of the jury entirely and completely.

Mr. Rosen: I don't think any verdict can be rendered at this point.

Mr. Kogen: Unless it's a not guilty verdict.

Mr. Evans: Your Honor, I would ask at this stage the lady not be asked anything—

The Court: I'm not going to ask anything [31] about the verdicts. I solicit your advice, gentlemen.

I don't want to ask anything about their deliberations. We don't know what she is going to say.

Mr. Popper: Let's let her talk.

The Court: I'm going to tell her not to tell about the deliberations.

Come in, Mrs. Harachiewick. Have a seat. I hope you don't mind the lawyers being present.

Juror Harachiewick: No, sir.

The Court: Sit down.

That's all right. You may smoke.

As I mentioned to you in my note to you, I was delaying any decision on these problems, on this problem, so that I could get the lawyers together and discuss it with them.

I have discussed it with them to a considerable extent. We were in the process of discussing it when I got your most recent note. And I assume this is what you want to talk to us about?

Juror Harachiewick: Yes, sir.

The Court: Before you say anything to us, let me say again to you, although I do appreciate the diligence with which you have been conducting your affairs to and including advising us about the outside [32] information situation.

So, I don't want you to think I am putting a gag on

you, but we really are not entitled to know what your deliberations are.

Juror Harachiewick: No, sir. This has nothing to do with that.

The Court: So, keeping that in mind, tell us everything you want to tell us about this situation.

Juror Harachiewick: There is a lot of hallucinating and there was a lot of hallucinating over the weekend.

The Court: Could you give us some idea, some examples of what you are talking about?

Juror Harachiewick: I can give a very good idea, but I don't know whether I am at liberty to give it.

The Court: Does it involve certain people in the case? That is, her position about certain of the people?

Juror Harachiewick: No. Defendant-wise?

The Court: Yes, defendant-wise.

Juror Harachiewick: No, it does not involve defendant-wise.

The Court: Just tell us who does it [33] involve?

Juror Harachiewick: Basically, she said Friday afternoon that she had discovered that she had an IQ of well over 200. This was revealed to her during the night before. She could not relate to us. She had to come down to one person.

I don't know how far to go. I have in my possession notes that she made of things she said and I feel strongly that the woman is very ill.

The Court: When is the first time that you noticed this?

Juror Harachiewick: It started Friday morning about 9:00 o'clock, 9:15. I got her, I thought, calmed down

and then I wrote another note, if I'm not mistaken, around one o'clock Friday afternoon.

The Court: 1:40 to be exact.

Juror Harachiewick: From then on there's been no let-up.

The Court: Not even over the weekend?

Juror Harachiewick: I was up Friday night. I stayed up until I would say about three o'clock, waiting for her to get up because she had been up and down.

I went to bed about three o'clock and—don't get me wrong. My sleep, I am used to it, but about three o'clock I went to bed and she was up. I hadn't gone to bed—

The Court: She's next to you?

Juror Harachiewick: No, sir. I had not been in bed half an hour when she got up and was up most of the rest of the night. She was up. Saturday night, Saturday night she stayed in bed all night.

The Court: Did she watch television?

Juror Harachiewick: No, sir. Last night she was up.

The Court: You had a movie last night?

Juror Harachiewick: Yes, sir, I did not attend. She did not attend.

The Court: She was up? What was she doing?

Juror Harachiewick: She goes to her room, stays in her room a good deal of the time.

She was up about eleven o'clock. I got her back to bed and then I went to bed and she was up, I believe they said from about four o'clock on. She wanted to go to another juror's room, not mine.

She started about 5:30 and finally they came and got me and I went down and told her, "You are not going to disturb anyone until it's time to go down to breakfast."

[35] And I am aware they spoke to her husband Friday night, I believe, when he came. And as far as I know, she has had no past history of this type thing.

The Court: You say you have a series of notes as to what she said?

Juror Harachiewick: (Indicating affirmatively.)

The Court: Gentlemen, do any of you have any objection to my looking at these notes?

Mr. Evans: Your Honor, may we—

The Court: You look hesitant. Does it relate to the position,—

Juror Harachiewick: I have not read the notes.

The Court: They are your notes?

Juror Harachiewick: No, they are her notes.

Mr. Evans: That being the case, not knowing whether we are getting into the matter of deliberation, I have become super cautious.

Mr. Kogen: I would ask the Judge to read them in camera.

Mr. Varon: You don't have to know. The Court ought to know.

Juror Harachiewick: I think they are [36] very important. I'll put it that way.

Mr. Varon: You read it and don't let—

Mr. Evans: I think that would be advisable before we proceed.

The Court: Marshal, take Mrs. Harachiewick out.

(Thereupon, Juror Harachiewick left the room.)

Mr. Evans: My concern is, if she's got notes of six to six or something like that on a particular count, as I understand the case which could be done, an incidental part of a note, that's an automatic mistrial, if it's conveyed to the Court even if it's not conveyed to counsel.

The Court: If that is a fact—

Mr. Tarkoff: How do we send the woman to a psychiatrist?

The Court: Say that again.

Mr. Evans: I haven't done a lot of research on this recently, but my understanding has always been, if it's conveyed to the Court or counsel—

The Court: The position of the jury?

Mr. Evans: —that's an automatic mistrial.

Mr. Kogen: Who will object to that? [37] I'll waive my right and have the Court read in camera because for the best interest of this case and this person, the Court should know about it.

The Court: The problem, Mr. Evans, is this: This lady, the forewoman, seems to think it's important that somebody see these notes.

Mr. Evans: I don't disagree with it, Your Honor. I am looking at it purely and simply from a case law standpoint.

If other counsel take the same position as Mr. Kogen, then I don't have a problem with it. But I do think there is a case law problem.

I am speculating, since I don't know what is in the notes in any event.

Mr. Matthews: It's probably something personally embarrassing.

Mr. Evans: If all counsel take Mr. Kogen's view—

Mr. Kogen: It may be more detrimental to the cause and to her if we don't.

Mr. Tarkoff: On behalf of myself and Mr. Mahon, I request that the Court read them in camera.

If there are any of those material, six to six, I request that those notes be conveyed to us.

[38] **Mr. Rosen:** I was uncertain. Perhaps I misunderstood. Did Mrs. Harachiewick say she herself has not read the notes?

The Court: That is the impression I got.

Mr. Rosen: How can she determine they are so important in the first place?

Mr. Tarkoff: I got the impression Mrs. Loescher gave an idea what kind of notes these were.

Mr. Popper: Helping this Mrs. Loescher, we are in a Pandora's Box and we have been ever since you got those notes and conveyed it to us.

I think you should read these even if there is a mistrial, but I am not in a position to waive the rights of my client that may well affect their future and their life at this point in time.

The Court: Mr. Varon, how do you feel?

Mr. Varon: I agree with Mr. Kogen, Your Honor. I am willing to waive.

Mr. Matthews: I'll agree, Judge.

The Court: Mr. Rosen?

Mr. Rosen: I disagree with Mr. Evans' statement of

the law. For that reason, I feel it would be appropriate for the Court to look at it.

The law may not inquire as to the numerical division of the jurors. That just happens to be [39] one of the laws. If the Court runs across that, you don't have to tell us.

The Court: Let me insert one factor into this equation that you won't think about that I do think about.

I am now in the position of a juror deciding a case. That case is whether or not to grant a mistrial.

How what I see in there will affect me in that regard, from a human standpoint, is something that you all should consider.

Mr. Kogen: I think it should affect you.

Mr. Varon: It will lend validity to your judgment as to whether or not there should be a mistrial.

The Court: Somebody has to make it and I guess I am the one that is supposed to make it.

Mr. Evans: As I indicated, I don't profess to know what the Fifth Circuit has said about this. The only thing I am indicating is my recollection of the law which I haven't researched recently.

If a count of jurors is disclosed to the Court, even though not disclosed to counsel, that there are very possible problems, but—

The Court: Let me say this: It is very [40] unlikely.

Mr. Varon: Do you want to know when the Court is about to give an Allen charge, in conjunction with that, the numerical division?

That is the only time that comes up. This is so far removed, it is not an automatic mistrial.

The Court: Plus, I don't think we'll find such a thing in this note.

Mr. Popper: I agree. I don't think I can waive this.

Mr. Kogen: We have a problem. There is one counsel missing that represents three defendants.

Mr. Varon: Mr. Popper is representing—

Mr. Tarkoff: As to your problem, I know it is academic, but the law presumes a judge can put those factors out of his mind that are not to affect the decision he makes.

The Court: Hopefully that presumption is correct.

Mr. Rosen: I want to inquire what else she observed.

The Court: Maybe I should let her know that I will do it in fact, *in camera*.

All right, so if you gentlemen will excuse me just a moment, I will not ask my questions of Mrs. [41] Harachiewick in your absence. I will review these documents.

The court reporter will remain here.

(Thereupon, Mrs. Harachiewick came back into the room.)

The Court: Do you have the notes with you, Mrs. Harachiewick?

Juror Harachiewick: Yes. May I ask one thing? Will this be publicized? Or will it be carefully weighed and monitored before publication? This woman's health is important.

The Court: Yes, regardless of repercussions.

(Thereupon, an *in camera* hearing was held, after which the following proceedings were had:)

The Court: Gentlemen, let the record show that we are all back together again.

I have examined, in camera, approximately, and I think maybe exactly, but I counted quickly, 57 what appear to be five by three index cards.

They all appear to be written well, sometimes it's scribbled, other times it's printed, but I gather they are all Mrs. Loescher's.

[42] Now, I have read them all the extent that I can read them, which is why I took so long to do it. I didn't realize there were this many, and I did want to read them all.

Mrs. Harachiewick, how did they come to be in your possession?

Juror Harachiewick: They were found on the bathroom windowsill during lunch, approximately five minutes prior to your getting my note.

Mr. Rosen: I can't—

Juror Harachiewick: I'm sorry. They were found on the bathroom windowsill a few moments before your receiving the note.

The Court: Most recent note?

Juror Harachiewick: Yes.

The Court: When you say the bathroom windowsill, you mean the facility being used by the jury?

Juror Harachiewick: That is correct.

The Court: Do you know whether or not Mrs. Loescher has been referring to these notes during her deliberation?

Juror Harachiewick: I have not seen her referring to any notes. I did say we were not allowed to have any-

thing in there other than testimony, memory [43] of the testimony, and the exhibits that were supplied to us.

That we were told that we were not allowed to make any notes and bring them to deliberation.

The Court: When you got started or sometime thereafter?

Juror Harachiewick: A couple of times.

The Court: These are a series of index cards in handwriting, some in ink and some in pencil.

Without telling you what is on them, they are a synopsis of the evidence presented in the case to and including a summary of the closing arguments in the case as well as some observations made during the deliberation.

That is the general nature, without going into any detail as to what is in them.

Now, Mrs. Harachiewick, when we were in and before the lawyers came in, you indicated you had something else you wanted to tell us. Something else you found or did I misunderstand you?

Juror Harachiewick: No.

The Court: You were going to tell me where you found these?

Juror Harachiewick: Yes. I did not know what was in the notes. I have not read the notes.

[44] **The Court:** Do you know if any other juror has read them?

Juror Harachiewick: I know they were not found by me and I do know—

The Court: Were found by you?

Juror Harachiewick: Were not.

The Court: Who were they found by?

Juror Harachiewick: Mrs. Spires.

The Court: Do you know whether or not she brought them directly to you?

Juror Harachiewick: She did not bring them directly to me. She came and got me.

The Court: I see. What did they then do?

Juror Harachiewick: What do you mean?

The Court: Where did she take you?

Juror Harachiewick: To the rest room, that is where she had found them. They were by her purse.

The Court: Whose purse?

Juror Harachiewick: Mrs. Loescher's, Dorothy, I know her by.

The Court: Dorothy Loescher's purse?

Juror Harachiewick: Yes.

The Court: Do you know if Mrs. Spires [45] had touched them?

Juror Harachiewick: Yes, sir.

The Court: She had or had not?

Juror Harachiewick: She had.

The Court: Do you know if she had read them? That is, in toto?

Juror Harachiewick: Not fully. I am sure she had not had time because we had not been having lunch that long.

The Court: Do you know of anyone else that saw them?

Juror Harachiewick: I know that there was one other person in the bathroom between my finding them and getting them because I did not know what was in the notes. I did not look at them.

The Court: Who was that other person?

Juror Harachiewick: I believe it was Jim.

The Court: Zemba?

Juror Harachiewick: Zemba. I believe. Because I had to wait for him to come out. I am sure it was Jim Zemba.

The Court: All right, now, getting back to the question of her condition: Could you give us some concrete example of what led to your concern [46] without going into—

Juror Harachiewick: Hallucinations. Purely hallucinating.

Plus, the fact when talking to her directly, I talked to her to quite an extent and the pupils of her eyes just go from Dilating to pinpoint size, which is—

The Court: While you are talking to her?

Juror Harachiewick: While she is talking.

The Court: Have you had any medical training of any kind?

Juror Harachiewick: No, sir, none.

The Court: It is based on your experience?

Juror Harachiewick: The eyes bothered me very much and her way of talking bothered me very much. From one moment she would be up on a laughing scale, and the next moment you would have to be calming her down from a crying jag, which is not normal to me.

The Court: Was there anything unusual or strange about what she was saying?

Again, I ask you not to tell us about any voting, but I mean in general conversation.

Juror Harachiewick: Yes, sir. I'm [47] sorry, may I ask one of the marshals a question?

The Court: You may.

Juror Harachiewick: Was it Bob that was there Saturday?

The Marshal: Yes, ma'am.

Juror Harachiewick: I don't know the marshal's last name, and I am sorry.

The Court: Is his name Holt?

The Marshal: Guerrera.

Juror Harachiewick: No, Bob Holt is with us every evening. He was there Saturday and he was the only one she could really relate to. He was the only one up on her level.

She is a genius. We are all beneath her so far she cannot relate to us. But, she was going to choose one of us that she could relate to and maybe she could get down on the other person's level. I was not one of the ones that she could come down to my level.

Yesterday it was Jim that she could relate to.

The Court: Zemba?

The Marshal: Jim Cornish.

The Court: Oh, the marshal?

Juror Harachiewick: Yes. And when I [48] am saying relating, I don't mean relating as far as the case is concerned.

I did everything possible to try to keep her from relating the case. However, she did try to speak of the case to the marshals, if it was possible, but I did everything in my power to keep her from speaking of the case.

The Court: How about during the deliberations?

Juror Harrachiewick: When it started, we stopped.

The Court: Beg your pardon?

Juror Harachiewick: When it started, we stopped. This was what, around 1:00, 12:30 or 1:00 Friday.

Is that correct?

We stopped.

The Court: When what started?

Juror Harachiewick: Her crying jags, her up one minute, down the next. It started Friday morning.

Let me tell you this, because it does not have anything to do with the case:

Friday morning, when we came in, she got upset and started crying. I went in the rest [49] room with her and she told me it was her mother's birthday and her mother's been dead X-number of years, and it upset her because she had realized it was her mother's birthday.

I said, "Fine, if you need to cry, get it out and we'll go back to work."

She kept crying and I asked Sandy to come in and see if there was anything she could do. While Sandy was in with me, she started saying something in reference to the case.

I said, "Dorothy, forget it," and Sandy left immediately.

So, I got her calmed down. I stayed with her a few

minutes and got her calmed down and we worked Friday morning.

I thought things were going very smoothly.

The Court: How was she in her deliberations? Again, without telling us what she said, was she reasonable or unreasonable? Not from the standpoint of view, but from the mental standpoint.

Juror Harachiewick: I really can't answer that.

The Court: All right, go ahead. You deliberated Friday morning.

[50] **Juror Harachiewick:** We deliberated Friday morning 'til approximately lunch. We came back at a quarter to one, right?

And she started: She took her lunch and went to, you know, where we are deliberating. She went to the back row on the benches and sat down.

I noticed her crying so I went back and sat with her to see if I could calm her down.

And this is when she started on what she had discovered the night before, that she was a genius. There were a number of things that had been revealed to her. It had been revealed to her why she was here. What her goal was. And, I am sorry, I cannot go into that.

I thought it best at that time to not deliberate any more on Friday. I wrote the note to that effect.

Friday afternoon we stayed until a few minutes after five and she was up one minute on a laughing whatever, and she was down the next on a crying spell.

So, Friday afternoon when we got to the motel—I am trying to think if she laid down at all.

It seems to me she laid down a little while but I had

several discussions with her after we [51] were there and we kept a key to her room Friday night and, I believe, I can't remember, but I believe we kept the key to her room Saturday night.

We have had keys available to her room, but I got permission from her.

Mr. Holt was going to obtain a key at any rate, but I got permission from her to keep her key and she agreed to it readily.

She was up from about sometime between three and four, she got up Friday night, and was up most of the rest of the night.

And Saturday night she did not sleep, or she was in her room. Whether she slept or not, I don't know. But she was in her room all night and last night she was up.

More than that, I can't tell you.

The Court: How did things go this morning?

Juror Harachiewick: Well, I have been keeping a close watch on her this morning and this was what concerned me.

The Court: These notes?

Juror Harachiewick: And her facial expressions.

I am sorry, I do not wish to go into [52] that, her facial expressions.

The Court: When you sent me the first note this morning which was—

Juror Harachiewick: 9:00 when I got there.

The Court: Yes. What was the reason for that?

Juror Harachiewick: Well, she had been up since, she had been up this morning since around 4:30, I believe, and I was quite concerned about it.

The Court: Have you deliberated at all this morning?

Juror Harachiewick: Yes, sir.

The Court: How was she acting during the deliberation, speaking generally.

Juror Harachiewick: She was very fidgety, very nervous.

The Court: Was she contributing?

Juror Harachiewick: Not a lot this morning.

The Court: Well, without in any way requesting subject matter or names or anything of that nature, were there any points that had to be, whether they were evidentiary or any other things, discussion of evidence, whatever, any point that required input [53] from all of you at some point this morning? An expression, a view of any kind?

Juror Harachiewick: I don't think so.

The Court: In other words, she was not called upon this morning to offer any opinions or views?

Juror Harachiewick: No, sir.

The Court: Did what she say seem to make sense or not?

Juror Harachiewick: Yes, sir.

The Court: It did seem to make sense?

Juror Harachiewick: (Indicating affirmatively.)

The Court: If you had to give us a layman's conclusion as to what you think her problem is, how would you describe it?

Juror Harachiewick: I can't do that fairly.

Mr. Rosen: I couldn't hear her.

Juror Harachiewick: I can't do that fairly without saying things that I feel should not be said.

The Court: Mm-hmm. Do you think she has a problem?

Juror Harachiewick: Most definitely.

The Court: Is it a problem associated [54] with natural disposition, or is it a problem you think is one of illness? If you understand that question.

Juror Harachiewick: I feel over the weekend and this, again, is strictly my feeling, that she has gone through some terrific mental pain.

The Court: Mm-hmm.

All right, now, Mr. Miller, would you take Mrs. Harachiewick into the jury room, this one again.

(Thereupon, Juror Harachiewick left the room.)

The Court: Is there anything else you gentlemen would like me to ask this good lady?

Mr. Rosen: Absolutely. I would like to know what the things were that she didn't think she should say as long as they are not dealing with the deliberations.

For example, the reports we had to the Court as to her hallucinations and one minute she is Jesus and the next she is Moses.

The Court: I don't know why she was reluctant unless she was going to get into this lady's positions.

Mr. Rosen: Those positions we would like to know about, what type of position.

[55] **The Court:** You mean as to the defendants—

Mr. Rosen: No. As to one time she's Jesus and the next time she's Moses.

The Court: Any comment, gentlemen?

Mr. Evans: Not knowing the source of her reluctance, Your Honor, I think the Court has made it very clear to her the things that the Court doesn't want her to go into and I can only say, for my part, I attributed her reluctance to the admonishment of the Court.

It seemed to me she was trying as best she could articulate up to the point of getting into her state of mind—that is Mrs. Loescher's state of mind—having to do with her evaluations or purported evaluations of the evidence in the case.

Mr. Tarkoff: One point was most telling.

Do you think it's illness or natural disposition? That can be answered in one word.

I read she didn't want to be put in the position to say what this woman's mental status was. All she had to say was illness or disposition.

Mr. Rosen: I think she said as soon as she came in that she feels very strongly she is sill.

The Court: She needs help.

[56] *Mr. Rosen:* She used the words she feels strongly she is ill. This is about the fifth thing she said.

Mr. Evans: I don't know that further inquiry of this lady is going to shed more light on it. We have the observations of the marshals and, for our part, we are prepared to request that the Court ask a doctor to, in the presence—we would add, in the presence of Mr. Loescher, ask him to come down.

The Court: Excuse me one second.

Mr. Evans: We would ask that the Court give very specific directions to the doctor concerning what he

can properly talk about at this point and then have a professional opinion rendered based on the factors that are known.

Mr. Matthews: I am perplexed about the fact Mr. Loescher visited with her Friday evening and, according to the marshals—

Mr. Rosen: Not Friday evening.

Mr. Popper: He visited Friday evening. He did not visit after that day.

Mr. Rosen: I thought he spoke to them.

The Marshal: They did meet and sit and talk together Friday evening, and not visit the rest of the weekend.

[57] **Mr. Matthews:** Friday seems to be the day this became so noticeable to her, but the husband seems to think everything is all well and good.

The Court: Apparently not to the husband.

Mr. Tarkoff: One thing I would like to say: I think Mr. Evans comments you can either treat the medical or deal with the legal one. I don't think we can call a doctor in and try to get her help and tell him what he can't do.

The Court: There are two inquiries, one is if he can determine whether she needs help.

If she needs medical attention, can it be done quickly or is it long-range?

If it's long-range, she goes. Then we'll have to take whatever sequences follow that. Those are the first inquiries we have to take.

Does she need help? If so, what kind.

Mr. Rosen: There is something else to discuss, and that is the question of the notes.

We are presuming that they were left by Mrs. Loescher. There is no indication they are hers. There is no indication they are any of the jurors'.

The Court: Let me say, based on [58] what Mrs. Harachiewick just told us, there is no question but what they are hers.

Mr. Matthews: However, we don't actually know that.

Mr. Rosen: It strikes me as unauthorized information disseminated to the jury one way or the other.

The fact it was found there this morning doesn't tell us whether the entire week they were referred to.

The Court: We don't know. These notes, I will say this, were taken, without telling you what was in these, during closing arguments and prior to closing arguments.

The Marshal: They were not there Friday. I went in with the cleaners to clean that area on Friday. They were not there.

Mr. Tarkoff: We know they are not Mrs. Spires', Mrs. Harachiewick's, or Mr. Zemba's.

I would move for a mistrial because of those notes.

Mr. Popper: I submit that they call for a mistrial. All these accumulative difficulties, I don't think you can cure them all.

The Court: I don't think we are out of [59] the ball-game yet, if nobody saw these notes. Mrs. Harachiewick says that she didn't look at them and I bet Mrs. Spires never got past the first couple. When she realized what they were, she stopped.

Mr. Popper: It doesn't have to go more than a couple. We don't know what was on the couple.

The Court: They are invading the province of that jury.

Mr. Tarkoff: Whoever wrote them knows.

The Court: I would presume, because I know this lady wasn't taking notes during the trial, I would assume they went home during the evening and made the index cards.

Mr. Rosen: How do they look, Judge? I mean, objectively.

The Court: I will say this to you, they indicate anything but a diseased mind. They are coherent, flowing, accurate, by and large.

They are observations as to the testimony as the case went by.

Mr. Popper: Judge, if, as you say, it may be she went home at night after testimony and took them down prior to any problem she may have mentally. That, in and of itself, is a violation of the Court's order to bring that back in.

[60] **The Court:** It may be. I'll have to check.

Mr. Evans: Your Honor, we would like for the Court to do what it indicated it was going to do. That is, take this one step at a time.

First, determine this lady's health.

Then, we are probably going to have, as the Court indicates, a brief voir dire of Mrs. Spires. We are prepared to make certain motions and requests based on answers that may be forthcoming and on actions that the Court may take regarding this lady, but I think we are going to have to get that out of the way first.

The Court: I think so. I know Mr. Rosen would like me to go a bit further.

Any further questions you would like to ask Mrs. Harachiewick?

Mr. Rosen: The only further question I want, Your Honor, is just the area that she didn't want to discuss.

If it had to do with deliberations, I concur.

If it was out of compassion for Mrs. Loescher, then I object.

Mr. Popper: One other thing I would [61] like to find out, whether or not she did inquire as to the other jurors as to whether or not they found these cards.

The Court: Put these in a brown envelope, seal them and put the date and case number on them, and so forth.

Mr. Popper: I don't think anyone has inquired of her, at least not before the attorneys, as to whether or not she asked the other members of the jury whether they saw these cards.

Mr. Matthews: It's obvious.

The Court: I will ask her that and I will ask her about the areas she didn't want to tell us about so we'll have the record complete.

Mr. Matthews: What time approximately did her husband visit with her?

The Marshal: I don't know what time it was. Late Friday afternoon or early Friday evening.

The Court: With that, I think we will send her back.

The only question we might as well talk about before we get her in here, does anybody want or suggest or demand that I bring Mrs. Loescher in here?

Mr. Popper: Judge, I'm afraid, if [62] there is a problem, we might destroy the woman.

[62] **The Court:** Mr. Matthews raised a point of some interest to me and that is whether or not I have the authority to have this woman examined by a psychiatrist

against her will.

Mr. Popper: I think he is right. I think it is a mistrial.

The Court: What do you say, gentlemen, in that regard?

I think I have the discretion to order under these circumstances—

Mr. Evans: If the Court explained to Mr. Loescher what the circumstances are and introduced him to the doctor initially, I think he would be in the position to register what would be a properly sufficient consent.

If he said, "Absolutely not, I don't want any doctor talking to my wife," we would have to deal with that situation.

But, I think in the orderly progress of the trial, the Court has that prerogative.

Mr. Rosen: May I make a recommendation, Your Honor?

The Court: You may.

Mr. Rosen: Go back to the jury room [63] and the jury go back to the jury room, and not aggravate each other. Give them the sanctity of the rooms.

The Court: Before we get rid of Mrs. Loescher, I am wondering, this is kind of a circular-type situation we are in.

If we ask Mrs. Loescher, can we examine her, and indeed she is in a state of illness, I am not sure any consent we get from her would be valid.

Mr. Popper: Not only that, you have a very antagonized person for the purposes of a trial.

Mr. Levin: Assuming Mrs. Loescher is aware of what happened with the cards, whether or not Mrs. Loescher

is aware, Mrs. Harachiewick has presented these notes, although I would assume she probably is, it is really getting into a very delicate situation.

The most delicate way of handling it would be to bring her husband and use him as an intermediary. It still becomes a very delicate situation.

It may be appropriate for the Court to find out from Mrs. Harachiewick exactly what it is that Mrs. Loescher is aware of in terms of the contacts with the Court.

And, once aware of that, then perhaps the Court can better determine whether or not the Court should inquire of Mrs. Loescher.

[64] If Mrs. Loescher is aware Mrs. Harachiewick has contact with the Court regarding Mrs. Loescher's emotional state and feelings at this time, it is not difficult for the Court to have contact with her.

The other way, if she is unaware, we are in the same situation.

The Court: She is unaware that Mrs. Harachiewick is contacting us about her.

We are in, as one of the lawyers put it, a real Catch-22 situation because she still needs to be examined and we are going to have to work it out some way. And, the doing of that may create anger, resentment, I don't know, on her part.

Mr. Rosen: Your Honor, if we are not going to get sufficient additional information from Mrs. Harachiewick, then I would ask the Court to have the Marshal's Service prepare in-depth memos as to their observations when she was claiming the hallucinations as to the Lord having sent her, and being Jesus and Moses. I think we have to have something more definitive.

Who, when, where and how it was observed.

Mr. Evans: Your Honor, we would join in that request.

The Court: Will you take care of that, Cecil? Memo from each marshal setting forth in detail [65] what they observed and found and so forth.

Mr. Evans: And I would suppose that if we have somehow inadvertently become privy to anything having to do with the deliberations, that of course is not what is being called for.

The Marshal: As far as I know, they are not privy in any way.

Mr. Rosen: That will be communicated to the Court and the Court can make—

The Court: Let's proceed as follows: Let's get Mrs. Harachiewick back in, get more information, if we can. I will hold the question of whether to bring Mrs. Loescher in pending what we learn from Mrs. Harachiewick.

Mr. Rosen: It might be advisable to ask Mrs. Harachiewick whether or not Mrs. Loescher is aware of her irrational behavior in kind of preparation of things to come, because I think we are clearly going to have to get her some help whichever way it is.

The Court: Dr. Alspach has been mentioned by Judge Popper. Do any of you know him?

I don't know if we can get him to do it.

Is there anyone else you would like to suggest?

There's an objection to Dr. Stillman.

[66] *Mr. Kogen:* My suggestion would be to leave it up to you without discussion.

The Court: Dr. Alspach does have one advantage, if he is still there. That is, he is in the duPont Plaza Building.

Mr. Popper: If he is still there.

The Court: So that would offer some convenience. As far as I know, he is a very competent individual, but I am not wedded to any particular idea.

If someone else has somebody they feel ought to see her—

Mr. Evans: We would defer to the Court's judgment. We would ask that the doctor speak to the Court first before any kind of contact so we can be certain there is no problem created in that contact.

Mr. Rosen: Not too many psychiatrists want to get involved in court work.

The Court: He may do it. I don't know. I would frankly rather have him come to see me in the presence of you all. That might be very difficult to work out.

Let's get Mrs. Harachiewick back in, please, Cecil.

(Thereupon, Mrs. Harachiewick returned to the room.)

[67] *The Court:* Just one or two more questions, Mrs. Harachiewick:

Does Mrs. Loescher know you are in here discussing her condition?

Juror Harachiewick: No, sir.

The Court: Does she know that you have given me a couple of notes about her condition?

Juror Harachiewick: No, sir.

The Court: Does she feel that there is anything wrong with her as far as you know?

Juror Harachiewick: No, sir.

The Court: In other words, as far as you know, she

does not feel there is anything wrong with her, is that correct?

Juror Harachiewick: That is correct.

The Court: From your experience with her, how do you think she would respond to a request that we have her examined by a psychiatrist?

Juror Harachiewick: That is my problem.

The Court: Is that what you were unwilling to discuss a while ago? I was about to ask you some questions and you mentioned you didn't want to get into that or words to that effect.

We were discussing how she manifested her problem.

[68] **Juror Harachiewick:** I can answer, but I can't answer, if that makes any sense.

The Court: You mean without getting into deliberations?

Juror Harachiewick: Not necessarily deliberations. Feelings.

The Court: Raise feelings?

Juror Harachiewick: No, sir. Not rational feelings.

The Court: What kind? Do you mean which side?

Juror Harachiewick: Yes, sir.

The Court: That of course is deliberations. We don't want you to get into that.

Did she ever mention anything to you about feeling like she was Moses or sent in any way by some sort of Divine commission?

Juror Harachiewick: Yes, sir.

The Court: What did she say in that regard?

Juror Harachiewick: I can't answer that. This is what I can't—

The Court: Did she suggest to you or any of the jurors that she was Divinely commissioned to serve on this jury regardless of how she felt about how [69] it should come out? Or would you rather not answer?

Juror Harachiewick: No, I am trying to think.

She has had a lot of discussions with one other juror and I believe there has only been one other juror that she has had a lot of discussions with.

She has also, of course, I have been told over and over why she was sent, but I would prefer not to—go into that.

The Court: Has she ever told you or suggested to you that she was someone other than herself? You mentioned hallucinations and I am not sure what you meant by that.

Juror Harachiewick: Okay. She mentioned to me that—let me think how she said it.

At one point she was Jesus Christ. She came back and brought up the Mount which is Moses on the Mount.

She knew what her mission was. She knew what she was here to do and she fully intended to do it.

The only problem she was having at that time was knowing how to get down on a level so she could relate and she had chosen one person and she named another person to be that person.

The Court: Another person on the jury?

[70] **Juror Harachiewick:** No, not on the jury. On the case. That other person was to be her, she used "other person."

The Court: Was this during deliberations this was said?

Juror Harachiewick: No, sir.

The Court: Was this over the weekend?

Juror Harachiewick: This was over the weekend. This was not brought up during deliberations. If it had of been, I would have called a halt to it then.

The Court: Is that when she was referring to the other marshal?

Juror Harachiewick: No, sir. I don't think I am at liberty. It's not that I prefer not to do it. It's I don't think I am at liberty to name that person.

The Court: She was going to communicate with or through?

Juror Harachiewick: She used this juror and said they would be the closest knowledgeable-wise to this other person, and I know I am not making any sense to you.

The Court: All right. But she was going to communicate with a juror?

Juror Harachiewick: Yes, she was going to [76] relate to this juror and have this juror come down to the rest of our level.

For instance— May I stand up?

The Court: Certainly.

Juror Harachiewick: She would say, "I am up here, you are down here" [indicating], and "I have to get someone that can come in between so they can come down here to meet your level," meaning the other ten jurors.

The Court: She picked another juror?

Juror Harachiewick: Uh-huh.

The Court: By name?

Juror Harachiewick: Uh-huh, this was to me.

The Court: This was what she was saying to you?

Juror Harachiewick: Uh-huh.

The Court: Is this in the presence of the other jurors?

Juror Harachiewick: No, sir.

The Court: This is over Sunday or Saturday?

Juror Harachiewick: I believe this was Saturday.

The Court: Had such a thing ever been [72] mentioned in the jury room in the presence of the other jurors?

Juror Harachiewick: No, sir, not to my knowledge.

The Court: The point where I was confused was when you referred to her being on a level with somebody not on the jury and I didn't understand that. She just mentioned the name?

Juror Harachiewick: She is on the level with—

The Court: So-and-so?

Juror Harachiewick: —X-number of people who are not on the jury, but are involved with the case.

The Court: Then I gather she then found somebody, someone on the jury, she felt she could relate to?

Juror Harachiewick: Yes. This is where she used this [indicating], this [indicating], and this.

The Court: Okay. To your knowledge, were these notes that we have here ever shown to any other juror or ever seen by any other juror other than you and Mrs. Spires?

Juror Harachiewick: I cannot honestly [73] answer that. This was the first I had seen.

The Court: You had seen them?

Juror Harachiewick: And I have not read them but I am aware of a couple of things that are in there, but nothing I was not already aware of.

The Court: You mean in terms of what? Don't tell what in terms of evidence.

Juror Harachiewick: In terms of something that happened ove the weekend. This past weekend.

The Court: Some event over the weekend?

Juror Harachiewick: Uh-huh.

The Court: All right. Now, again, we want your help and your opinion.

How do you think Mrs. Loescher would react to our bringing her in here in the presence of the attorneys to talk to her the way we have talked to you?

Juror Harachiewick: I could answer that if the seating arrangement were different, I think it would be terrific.

When I say the seating arrangement, I mean inside this room. I am not talking about adding chairs. I am talking about changing people. I don't know whether I am at liberty to go into that at all.

[74] *The Court:* I don't think you better had from the sound of it.

Juror Harachiewick: I really can't say what her reaction would be. I have been told by her what her reaction would be later.

The Court: You have been told what?

Juror Harachiewick: By her what her reaction would be later, if she were called into a meeting like this.

The Court: To the next meeting, for instance?

Juror Harachiewick: If we were called into the court-

room, but I don't know if she even remembers that and I cannot answer that.

The Court: Does what she told you relate to the parties in the case, her reactions?

Juror Harachiewick: It relates to the case.

The Court: Let me ask you a couple of leading questions.

Would she resent being called in again? Is that the net effect?

Juror Harachiewick: No, sir.

The Court: She would be glad to be brought in again?

[75] *Juror Harachiewick:* Yes, sir.

The Court: She would like to tell us some things?

Juror Harachiewick: She would like to convey some messages with her eyes.

The Court: With her eyes?

So she would not resent being brought in as long as we had the parties rearranged?

Juror Harachiewick: Yes, sir.

The Court: Did she tell you that or are you surmising it?

Juror Harachiewick: In her time of speaking, she will tell you what came to her during the night.

The Court: Uh-huh.

Juror Harachiewick: In her time of speaking, she told me another event that came to her during the night that would come true.

The Court: That would what?

Juror Harachiewick: Would come true and she would be sitting between people.

The Court: Oh, I see. She prophesied?

Juror Harachiewick: In discussing the case.

The Court: She figured out in advance we [76] would be meeting together and she told you whom she would be sitting between?

Juror Harachiewick: And that she would be discussing the case and that they would know that everything would be fine. She would take care of everything.

Am I saying more than I should?

The Court: No, because we don't really know what you're talking about.

Gentlemen, I think we have gone as far as we can with Mrs. Harachiewick.

I do appreciate your interest and your difficulties. I think we will excuse you in just a few minutes. Just tell everybody to be at ease.

Juror Harachiewick: Excused for the afternoon?

The Court: For the afternoon, yes. We are not going to do anything, surprisingly.

Juror Harachiewick: You don't want us deliberating any more this afternoon. I can cover that.

The Court: Would you wait outside just a minute?

Keep Mrs. Harachiewick out in the hall a moment.

I won't call you back in. I'll talk to [77] the lawyers about what we want you to tell the jurors as far as further procedure this afternoon.

(Thereupon, Mrs. Harachiewick left the room.)

The Court: First, gentlemen, about further deliberating this afternoon—

Mr. Evans: We would request they not deliberate any further until further notice from the Court.

The Court: Any disagreement?

Mr. Matthews: Judge?

The Court: Yes, sir.

Mr. Matthews: As to how to handle that, I would suggest that you were advised that we have not acted on the information requested; therefore, they not deliberate any more.

The Court: We are meeting and we will have word to them shortly as to whether or not they will have the rest of the afternoon off.

We haven't decided one major point yet, and that is whether we are going to talk to Mrs. Loescher.

Mr. Varon: That is a mistake. We'll destroy her.

Mr. Rosen: She'll read something into [78] our eyes.

Mr. Popper: If she's in the position that she's sent here to do something that she's been told to do, then she's predetermined this case.

The Court: Let me say this to you: Maybe I ought to talk to her. It isn't going to take long to make a decision if she comes in here and says to me that, well, I don't want to guess what she might say.

If she states something that is obviously the product of a sick mind, then we had better get her help and take some other measures fast.

Mr. Evans: Your Honor, I wonder if that is what we should do? I would request that at least I be excused and maybe Mr. Levin represent us.

Perhaps Mr. White should stay and Mr. Levin and I—

Perhaps the Court should attempt to proceed by itself or, if one or two members of the defense team could stay also, I think that would be preferable.

The Court: I haven't decided we're going to do it.

Mr. Rosen: Apparently Mrs. Loescher is unaware. It is one thing to bring the woman in, but we don't know whether to bring Mrs. Loescher in is going to do something. We don't know if it's going to be good [79] or bad.

The Court: How are we going to approach the question of having her examined?

Mr. Tarkoff: If she is having a psychotic problem, we could trigger something really bad.

Mr. Levin: I think it is unavoidable for the Court to have contact with her. With all due respect to Mrs. Haraschiewick, who seems to be a very sound person and demonstrated a great deal of intellect in terms of how she has communicated with the Court today, and the prior occasions in court, we are still dealing with her assessment of Mrs. Loescher and—

Mr. Tarkoff: On one hand, we say we want to help her, and on the other hand, Mr. Levin wants to take a risk that would do severe damage.

Mr. Levin: I am sure Mrs. Loescher was upset about her mother's situation and it's appropriate for the Court to make inquiry as to how she is feeling.

Mr. Tarkoff: If a person has a mental problem, they usually have no insight into having—

Mr. Popper: If she does, you'll know it. But, Judge, for us to sit here in limbo with maybe if the Court sees her alone or if counsel is present, you can well make a determination of what has to be done.

[80] We are playing, and no matter how we end up, we are going to have somebody that may not be sick. We owe a duty to a bunch of defendants and the Govern-

ment to carry on the trial, and I think this is the one thing we have to find out.

The Court: Let me say this much to you:

These few documents do not indicate, in my humble opinion, any problems at all up until about the 17th, which is the Friday I think we are talking about.

With a paper clip, I have put those aside. At that point there are some strange comments. I don't know how to make them out. I am not equipped to make them out.

Mr. Rosen: If they are not deliberations—

Mr. Kogen: We would like to have them put in the record, if they are factual matters.

The Court: They are not deliberations but they are more or less in line with some of the things this good lady is saying.

They are not deliberations. Nowhere in these papers is there any count of any kind, so many for this and so many for that.

Mr. Rosen: I was talking about apparently [81] where she has gotten off the deep path. It may be helpful to the doctor, too.

There comes a question about the authority. This is a rather unique situation. I just wonder—

The Court: It is unique as far as I am concerned.

Mr. Rosen: —whether the administrator of the Court in Washington could give the Court some advisement, number one, to have it done and, number two, to incur the expense of it.

The Court: I am not concerned about the expense standpoint. It is necessary in the administration of this case.

The real question is, I think, more to the point. Are her private civil rights, which now are meshed with the civil rights of each defendant and the Government, whatever civil rights a government has?

Mr. Evans: I have stated opposition on that.

The Court: Gentlemen, I think we have got to fish or cut bait on this and I think we are kidding ourselves, and I certainly don't want to be the cause of this lady having a problem, but I think I can handle it.

I think there ought to be as many of you [82] as want to stay here. If you want to have one person here from each side, that's fine, but I just don't think we can deal with the problem in the blind.

Mr. Rosen: I would prefer all or nothing at all.

I think everybody should be required to stay or everybody required to leave. The Court can't require it but it seems to me whatever is asked or said or done is going to be in the record and—

The Court: Absolutely.

Mr. Rosen: And, we can immediately after the Court's interview have the record read back to us.

Mr. Popper: With the exception, I would like to have a look at the demeanor of the person. I think it would mean more than a word on a piece of paper.

The Court: Her wanting to say something with her eyes, do you remember?

Mr. Evans: I would like to move—

The Court: Mr. Varon, I respect your position. You stated you think it is a bad idea. Would you tell me why?

Mr. Varon: From what I have heard, I believe this lady is going through the throes of a very psychiatric trauma

and this would only traumatize her because she is being isolated and the confrontation [83] might be more than she can bear.

What has been significant in the informal discussion was what she said before about the horrible expressions that this lady would use.

Then, she never discussed it any more until towards the end of her discussion on the stand when she said the expression in her eyes. But, she never elaborated about the horrible expression on her face.

No one pursued it and I didn't want to ask any questions about it.

This lady is going through a very severe, traumatic experience. If she is confronted with all the lawyers, and especially when she attaches such connotation to how the lawyers are arranged, maybe she doesn't want to look at a particular lawyer, or maybe she does. Maybe that one particular lawyer is the one she can relate to.

She is equating herself to the concern of the lawyers in this case as her contact with the jurors. So, Judge, that is the reason for my objection.

Mr. Kogen: I would agree with Mr. Varon, Judge, except there is only one alternative to that; get rid of her, declare a mistrial.

Mr. Evans: I wouldn't go quite that far because I think there is a way it can be handled in [84] terms of setting the first alternative and that is going to be our position, if we get there.

Mr. Rosen: I have an alternative.

The Court: Yes, sir.

Mr. Rosen: Why don't you get the psychiatrist, whoever is chosen, and have him here with Mrs. Loescher.

Introduce him as a court-attaché.

Mr. Popper: We are invading her civil rights again by having him here to evaluate her without her—

The Court: I wonder if the Court doesn't have certain powers under these circumstances? If it's handled delicately, it could be exercised.

Mr. Kogen: This is one of those areas where you have discretion. The welfare of the case and the woman calls for that.

Mr. Rosen: Maybe the Court ought to inquire whether the doctor is available, first of all.

Mr. Tarkoff: Or at least get the opinion from the doctor on how to proceed.

The Court: Let's suggest this, gentlemen: Let's let them go back home and then let's get ahold of the doctor.

If necessary, we can have the marshal bring her back here or I can go over there and meet in [85] the doctor's office either. That might be a better setting.

I think I ought to be in there at least and perhaps you all ought to also. We will leave it up to the doctor, but I don't want to abort this case until I am satisfied this lady is really sick and it sounds like she may be, but I really am not going to do that in deference to everybody.

Mind you, as I know you are completely mindful of, we are talking about a great deal more expense on the part of everybody.

I throw this out to you. Would you gentlemen consider going to this jury with an eleven-man jury?

Mr. Tarkoff: I would not.

Mr. Evans: We would.

Mr. Kogen: We would not.

Mr. Rosen: No, sir.

The Court: All defendants are agreed that they disagree with that suggestion. In other words, no one will agree to that except the Government.

Mr. Rosen: The Government hasn't agreed.

Mr. Evans: I thought we did.

As we read the rule, and I think it's Rule 24 in the interpretation of it, in mandatory terms, with respect to seating an alternative at this time, [86] there have been cases where that procedure, under the unique circumstances, they have permitted the procedure as long as no prejudice is demonstrated with respect to the procedure followed, and I don't know whether it could be accomplished or couldn't be.

Mr. Rosen: How can you demonstrate prejudice if you are not part of the deliberation?

The Court: Let him finish.

Mr. Evans: In this case, I don't think if this lady is excused, our position is we ought not to totally ignore the possibility of seating Mrs. Evangelist, if need be, re-instructing the jury all over and instructing the jury to begin deliberations now, starting from the very beginning.

I don't think that necessarily, in light of the interest of the administration of justice which are paramount to all of us and certainly proper for this Court to consider at this time, I don't think that procedure is necessarily unfair to anyone.

Mr. Tarkoff: I consider it to be unfair and, though it's rather novel what Mr. Evans says, I recall some of the cases he is citing. The only time it was approved is where the defense stipulated to it.

Mr. Matthews: So say we all, Judge.

Mr. Popper: That is like issuing a John [87] Doe subpoena and going on the street and saying, "Here, come listen to this."

Mr. Matthews: I think we are premature.

The Court: Gentlemen, if you want, I'll try to reach the doctor right now.

Mr. Matthews: Before you send her back, would you inquire as to whether any of the other jurors have made the same kind of observations she has made?

Mr. Kogen: You can't call them one at a time.

Mr. Matthews: I said inquire of Mrs. Harachiewick.

The Court: I did not inquire of that. Apparently most of her conduct that Mrs. Harachiewick referred to was at the hotel over the weekend, with the exception of Friday. Most of that was at the hotel except for the crying and all.

Mr. Matthews: The reason for the inquiry, Mrs. Harachiewick indicated about her going to somebody else's room and her keeping her away. I would like to know whether any of the other jurors know anything different.

Mr. Evans: With all due respect, I think we have to resolve this lady's mental state and one way or the other and then there may be or may not [88] be ways to deal with the other problems that exist.

Mr. Kogen: For the first time in a long time, I agree with Mr. Evans.

Mr. Evans: I would request Mr. Miller advise Mrs. Harachiewick and the jury that they can return to the motel tonight and there will be no further deliberations today.

Mr. Tarkoff: I think they should be told the Court has decided to cease deliberations for the day.

(Discussion off the record)

Mr. Rosen: Let's get rid of the jury.

The Court: Cecil, let's wait for this call back. We'll keep them waiting a little longer. Let's take a few minutes' recess and we'll hear from him just about 4:00.

(Recess taken)

Mr. Kogen: Mr. Varon left and said he had to leave, that Mr. Tarkoff was taking his place.

Mr. Rosen: Jim Matthews was standing down at the end of the hall.

Mr. Kogen: I'll stand in for Jim Matthews.

The Court: I talked to Dr. Alspach, gentlemen. He will see Mrs. Loescher.

[89] Incidentally, so that the record will be complete, three reporters stuck their head in the door and I told them only that we had a problem, we were trying to solve it. That it would probably be tomorrow before we solved it, and they asked me to spell Mrs. Harachiewick's name, which I did spell for them, and that was the extent of it.

(Discussion off the record)

The Court: They know we have a problem, obviously, and I told them that we were trying to get help but that was all I could tell them.

He will see her this afternoon at six o'clock. I told him that she was not aware of the situation.

He agrees, of course, her interest is first. I told him that what we wanted was an evaluation of her condition, that I was not interested in his going into her position as

to whom she was for or against, but I wanted an evaluation as to whether or not he thought she had a problem.

I told him a little bit about some of the things she had said, what the forewoman said about her.

I think I ought to send these notes over to him so that he can review these.

[90] *Mr. Popper:* Does that include the last group too, Judge?

The Court: They are both in here.

Mr. Evans: Has the Court alerted them to the fact that they do have a demarcation point?

The Court: I have not but I will do that.

Mr. Rosen: Are we attributing these notes to her then?

The Court: I guess he can find that out when she is there.

Mr. Tarkoff: Possibly the Court should explain why we believe them to be hers.

Mr. Rosen: What I am concerned about, Judge, is somehow maintaining the authenticity of the notes for future use, if need be. That is in the back of my mind.

The Court: We can have them copied.

Mr. Rosen: Send copies, if they are legible?

The Court: I don't think they'll be legible. They are in pencil, many of them.

Mr. Evans: In preserving the chain of custody, we could entrust them to one deputy and he would be instructed to let the doctor have them and retrieve them from the doctor and only deliver them [91] back to the Court.

But, I think I share Mr. Rosen's concern that they go from Cecil to another deputy.

The Court: Will you take care of that, Cecil?

Mr. Rosen: Do we have an accurate count?

The Court: I wouldn't swear to the accuracy of my count.

Mr. Tarkoff: The doctor can seal them himself, and we can have the doctor come and make some sort of record that he put all the cards back in and resealed it and that would preserve the chain.

The Court: Would you take care of that, Cecil, to make sure that he understands as soon as he is finished looking at them, he should give them back to the Marshal?

Make a count of them.

I think we will unseal this in order to make an accurate count. Perhaps I should do that before we let them go.

I told him what we were interested in is his impression of her present medical condition.

Two, if she does have a medical condition, and I meant that in a large sense, how long would it take her to resolve it. Is it something that can be [92] resolved in one or two days or does it require long-term treatment?

And, lastly, is she fit to serve on the jury and, of course, that answer will depend largely on what comes in the second answer.

Those are the questions I wanted him to ask.

Mr. Popper: There is a fourth question.

In his opinion as a professional, was she competent, based upon his knowledge, during the time that she deliberated. She may be in three or four days, but was she capable when she was deliberating.

The Court: I have the feeling—let me restate that.

I have the feeling if he can give the answer to the first several, he can give it too. Although I don't know that. I will ask.

Mr. Tarkoff: Is her husband to be consulted?

The Court: I said I thought I ought to be there and he said no, I don't think so. Her husband ought to be there. It's her husband's role to bring her in. He is aware of the fact that she doesn't know about this.

So, Cecil, we have to get the husband up [93] here for him to take her to Dr. Alspach, who is in the duPont Plaza Building.

The Marshal: Have him meet her there?

The Court: Yes, but a marshal ought to go with them.

The Marshal: If I have to count the cards, I will be there. There is his number.

The Court: Are you going to call him?

The Marshal: I will, or you may.

The Court: Why don't you call him. If you have any problems with him, let me know.

The Marshal: I don't think so.

Mr. Popper: Are we going to be called back at some particular time tomorrow morning on this?

The Court: I think what we should do is set up another meeting.

Mr. Evans: Before we act on how to contact the husband, I really think if it's humanly possible that the Court ought to be the one in touch with the husband about the matter rather than the Marshal's Service simply because of the weight of the office of the Court as opposed to the—

The Court: I can do that right now.

(Discussion off the record)

The Court: He will be there at a [94] quarter of six. He said he is sure surprised; in thirty years of marriage there has never been anything wrong with her nor before they were married. He is wondering if there is a trouble-maker on the jury because he said that she has taken this case very seriously.

He emphasized that a couple of times and said she would get upset if somebody was treating this case lightly because she is a serious person.

He says he wonders if somebody has been trying to make trouble.

Mr. Tarkoff: Which it would be a whole new can of worms.

The Court: Yes.

Mr. Tarkoff: So that the record is clear, I did state before I have an objection to the procedure. I do deem this to be unauthorized communication with a juror.

The Court: You did state that.

Mr. Rosen: Our position is based upon representations made by the Marshal's Office and confirmed by the forewoman that a mistrial should be granted at this time.

The Court: I am taking all motions for mistrial under advisement.

Mr. Rosen: I want the Court to understand [95] that although we are here and aware that she is going to see Dr. Alspach, it is not with our approval. It is with our approval for her well-being, but contrary to the principles of law.

Mr. Popper: I join in that motion. By this procedure we are not waiving our motions to—

The Court: I understand.

Mr. Tarkoff: That will be reflected for all counsel.

The Court: Yes. Now, let me count these.

Well, I was wrong. There are 52 and one of them is blank. Let the record show that.

The last one, I have made it the last one, is a blank three-by-five card.

All right, Cecil.

Mr. Rosen: One other thing that bothers me about the approach with the husband. If the husband has a calming effect on her, which apparently he does, and he is present with the doctor, it may not truly reflect what is going on with her when she is alone.

The Court: I don't know the answer to it. I can only do what the doctor suggested.

Mr. Rosen: Maybe he brings her in and he spends time alone with her.

Mr. Tarkoff: Some people don't.

[96] *Mr. Popper:* The experience I have had with Dr. Alspach in the past, he is a student that wouldn't matter what was going on, he is going to make a fair determination of what she is or what she isn't.

He is one of the finest in the field and truly honorable.

The Court: I think he is a good man.

Mr. Evans: With regard to where we are at this point, would it be the Court's intention to set a time for us to assemble in the morning?

The Court: Yes, I think we should give Dr. Alspach sufficient time to get back to me. I would suggest we meet about 10:30, 11:00, whichever is more convenient.

Mr. Rosen: Unless we hear to the contrary.

The Court: Nobody has any preference?

Mr. Evans: I would suggest 10:30 so we don't delay this matter longer than necessary.

The Court: Let's make it 10:30. I'll give these papers to Cecil.

Mr. Tarkoff: One quick thing. In case it is necessary to actually have a hearing, will the doctor be available for questioning if such occurs? It may not, but as a consultant —

[97] **The Court:** I assume he would be. I told him he wouldn't have to testify in the case because he showed some reluctance to get into it at all.

I told him, I forget exactly what I said, "This is not a case to call you in as an expert witness. This is to advise the Court."

Mr. Evans: With regard to Mrs. Evangelist —

The Court: She has been notified. She has even given a couple of telephone numbers where she can be reached. She understands she may be called back.

Mr. Evans: Based on what she has already been told, and maybe this isn't necessary, but I wonder if it might be wise to call her again and tell her to continue standing by and that situation will exist through tomorrow?

Mr. Popper: Has she been discharged, Judge?

The Court: Discharged from sequestration. She has been advised she may be called back and I will tell her to take special pains this evening to avoid any media coverage.

Mr. Popper: In spite of all that, we register a strong objection that she has been called back after 12 have been in deliberation.

[98] *The Court*: The chances of that happening if we lose Mrs. Loescher are pretty good. I understand the objections and I will be glad to have you put them on the record.

We'll give that further thought when it becomes necessary, but that is my disposition. I do not want to abort this case at this time.

Mr. Evans: I hate to keep bringing up other questions, but it occurs to me that of course the jury should not deliberate tomorrow at all until notified. Would that be correct?

The Court: That is up to you gentlemen. We haven't determined she is incompetent yet.

Mr. Evans: We would request there be no deliberations at all in the morning until this matter is settled.

Mr. Popper: In the face of what the Court's position is, should we lose this juror, we may get Mrs. Evangelist.

The Court: I think your point is about to be well taken. There is no point in their deliberating.

Mr. Popper: Number one, and they will have to start again on their deliberations. That will give another three weeks.

The Court: Would you tell the marshal to [99] take the jury back, advise Mrs. Loescher that we are going to have somebody talk to her, we are going to have a doctor see her at my request, Cecil, and that is just a precaution, that we want to make sure she is all right.

Mr. Evans: I hate to keep chiming in.

The Court: This is a unique situation and I want all the guidance I can get.

Mr. Evans: It would be my recommendation that Mr. Miller not advise the lady before the husband arrives as

to what is going to happen.

I would suggest once the husband arrives that together she can be told with the husband present, but that is one reason I requested that the Court call the husband, so that we back into this matter very slowly and delicately.

Mr. Popper: We'll still have another problem with regard to a 12-man jury if somebody else sends a note that they feel they might be affected at this point in time.

The Court: We can solve his problems. I am not nearly as concerned about his problem as I am—

Mr. Popper: When we get to 11, Judge, I am very concerned.

The Court: All right, gentlemen, is there anything further?

[100] I appreciate your consulting. I thought maybe—

The Marshal: Tomorrow morning, what time do you want the jury back?

The Court: I don't know when we will hear from the doctor. I would say have them over here at ten o'clock. They are not to deliberate until we let them know further. I suspect by that time I'll have an answer.

On the other hand, I don't see why they should be here before 10:30. Let's make it 10:30.

I'll see you gentlemen at 10:30 and they'll come back at 10:30. Hopefully we'll have what answers we need at that time.

(Thereupon, the Court was adjourned)

EXCERPTS FROM TRIAL TRANSCRIPT
August 21, 1979

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

U.S. District Courthouse
300 Northeast 1st Avenue
Miami, Florida

No. 78-185-Cr-WMH

United States of America,
Plaintiff,

v.

George Barone, et al.,
Defendants.

9:50 a.m., August 21, 1979

The above-entitled matter came on for trial before the Honorable WILLIAM M. HOEVELER, United States District Judge, pursuant to adjournment.

APPEARANCES:

(As heretofore noted)

[2] (Outside the presence of the jury)
(In Chambers)

The Court: Gentlemen, if any of you want to take your coats off, do so. It is kind of warm in here.

Gentlemen, let me tell you what has happened and then I am going to—because Dr. Alspach, who has very kindly just carved out time to do this, he has to be back or he should be back by eleven. He has another patient coming up.

I want to get him moving. Let me just tell you quickly what has happened.

As you know, Dr. Alspach—I think you know I had arranged for him to see Mrs. Loescher yesterday evening at six o'clock. I talked to Dr. Alspach at, I guess, about nine, or thereabouts, 9:30, in that neighborhood.

He gave me his view. I now want him to give you—

Mr. Kogen: Last night, Judge, or this morning?

The Court: Last night.

I now want him to give you his view in whatever way he wishes to do it.

[3] I think, for the record, we had better have Dr. Alspach sworn.

(Whereupon, Dr. Bruce W. Alspach was duly sworn.)

The Court: Doctor, would you simply tell the attorneys briefly about your examination, what you found, and then if they want any more detail, they may inquire.

Dr. Alspach: Certainly.

Judge Hoeveler called me yesterday afternoon and asked me to see Mrs. Loescher. He gave me a brief history as to the reasons for asking for psychiatric evaluation.

He asked me essentially four questions, or asked me to try and answer four questions. One was what Mrs. Loescher's present psychiatric status was; secondly,

whether her present psychiatric status would in any way color or influence her ability to serve as a juror; third, that, if so, how much extensive treatment would be necessary and would perhaps one to two days of treatment suffice to get her back into position where she could serve as a juror; and, fourth, what are the best interests in terms of the medical welfare of Mrs. Loescher.

I saw Mrs. Loescher, as Judge Hoeveler [4] said, at six last night, spent an hour with her. I had available to me some of the history that Judge Hoeveler had given me, and I talked briefly with her husband as well after I had seen her.

The history that I obtained from Judge Hoeveler was there was some evidence of bizarre behavior on Mrs. Loescher's part; that she had the feeling that she had been appointed to serve on the jury; that she had received ideas about what needed to be done in dealing with this particular case; that she had an I.Q. of approximately 200; that she felt and compared herself—felt herself to be Jesus Christ and compared herself with Moses on the Mount.

There was a history on last Friday, which incidentally was the anniversary of her mother's death, of a good deal of emotional lability, namely of laughing and crying, and over the weekend there was varied insomnia, she was up and down.

Clinically, when I examined her, she was hyperactive, shifting around a good bit. There was some pressure in speech. She was—which means it was very difficult for her to stop talking, and she was extremely verbose. It was difficult to keep her on one subject. She would get distracted and wander off. Some subject would come up and she would take that and [5] wander off, and I

would have to keep bringing her back, which we would characterize as loose-end associations.

Mr. Evans: Excuse me. Loose-end—

Dr. Alspach: Loose-end associations.

Her thinking did not stay on track, but it kind of got lost. She had sort of an exalted, elated expression on her face. You could characterize her as being euphoric.

Much of the time she was smiling in almost beautiful fashion. She was unquestionably grandiose, feeling that she was different from other people.

Her first question to me was whether or not I had the intellectual ability to deal with her, since she was above a genius in level, and I might need somebody to interpret from her to me.

She also had religious delusions and I will describe them. The first one started or occurred on Tuesday evening, when she said that God revealed himself to her and that all of the complexities of the present trial were shown to her to be really a very simple problem, even though it would require the wisdom of Solomon to understand this problem.

And she felt that God had given her the wisdom of Solomon.

[6] She went on to say that, "I have a mind that God gives to very few people and, as I said before, that I'm way above average."

Her second religious experience also occurred last Tuesday, when it was revealed to her that the jury was actually chosen not by the attorneys but by God and that this trial was really a way in which God was going to see that goodness was going to take its first stand in the world.

Her third and last religious experience occurred Friday afternoon, in the jury room, when she felt that the Good Lord was using her as an instrument. Apparently, there is a vote of some kind in which she was in the minority of one and she felt that this was the method that God was using in order to separate, as she said, the problem down to its basic essential.

She goes on in a very religious, delusional way to say she is guided by God, "I don't like confrontations, but I was forced to in this third religious experience and I was like Christ at Gethsemane."

She characterizes herself as being God's instrument, as I said.

In reference to some of the comments that occurred here earlier about the air conditioning. Mrs. Loescher felt that the air conditioning was God's [7] way—the lack of air conditioning, I should say, was God's way of testing her to see how much backbone she and the other jurors had.

Also, that she is essentially here on the jury now as a way of making this case come out the way God wants.

Essentially, what I am describing is a person who is going through a manic episode, with marked grandiosity, marked religiosity, and is by every definition psychotic.

There is no evidence of hallucinations. In fact, she became quite offended when I got into that area as a thought that she might be hearing or seeing anything that wasn't real.

Of course, she characterizes all of what she has told me as being very real indeed.

Her judgment, of course, is patently poor and she has no insight at all into her disturbance and that this then would be her present psychiatric status.

As far as the second question that Judge Hoeveler asked me, whether this would color or influence her ability to serve on a jury, the obvious answer is yes. She herself is not capable of functioning with good judgment. I'm sure that she would be [8] extremely difficult for the other jurors to communicate with and I'm sure that she would serve as a disruptive force on the jury. In fact, I did have a history where some of her ill-judged words she used as she characterized some of her fellow black jurors as niggers. This is characteristic of a manic individual who can be quite hostile, quite irritable and have very little sensitivity or awareness of the consequences of what they are saying.

In terms of the third question posed to me, would one or two days of treatment be sufficient or suffice to relieve this condition, the answer is no.

I would anticipate that we should plan in a conservative way with regard to her for at least three weeks, and it may be longer.

I am basing that on the present clinical picture.

From her husband I had a history that there has never been any prior psychiatric disorder or mood disturbance.

There are other factors that would determine how we would evaluate the prognosis, and I didn't do that last night, since it was not a definitive examination.

[9] However, my preliminary estimate would be at least three weeks.

In terms of the fourth question, what are the best interests of Mrs. Loescher, I think that she should not continue to serve on the jury. In terms of herself, I think it is fairly evident that whatever else is going on in Mrs. Loescher, the stress of serving on the jury and in a very conscious way attempting to make a wise decision, as she

characterizes it in her psychiatric fashion, a Solomon-like decision, is exerting stress on her that she is not able to handle.

I think the sooner she is removed from the situation, the better. As I said, I don't believe that she is capable of functioning as a juror, so it would also be in terms of the best interests of the legal process.

The Court: Thank you, Doctor.

Now, gentlemen, does any one of you have a question that you would like to ask?

Mr. Evans: Well, I have one. Under Category 2, Doctor, you indicated that she could not serve on the jury with good judgment and would be a disruptive force. You also said that she referred to other jurors racially.

As I understood what you were saying when [10] you made those comments, you attributed that to mental problems that she is having and not to her normal behavior; in other words, it's attributable to the other symptoms that you described. Is that correct?

Dr. Alspach: Very much so. With a manic individual, you are going to see a good deal of hostility coming out, a good deal of irritability and openness and the expression of thoughts that would not be typical of that individual, were they not going through a manic episode.

The Court: Mr. Kogen.

Mr. Kogen: Judge, I would ask a question of the Court, which may or may not lead me to a question of the doctor.

Has the jury, to your knowledge, reached a verdict as to any of the defendants?

The Court: Well, I don't know.

Mr. Kogen: The reason I ask that is because if they have—

The Court: I understand what you are getting at. Let me ask the doctor where I think your question is leading to.

Mr. Kogen: All right.

The Court: This jury started deliberating, Doctor, Monday last, not yesterday. Monday a [11] week ago. When do you think, as best you can tell us—and I realize you have seen her only once, but as best as you can tell us, when do you think this condition really got started?

Dr. Alspach: What we usually see in situations like this is a gradual build-up. It's hard to say when a person in a sense crosses the line. The best line that we would have, however, of saying when she became overtly psychotic is when she started to have these religious experiences, which was Tudday night.

Mr. Levin: That was a week ago Tuesday.

The Court: A week ago today.

Dr. Alspach: A week ago today. There were three of them. These have been essentially psychotic experiences. This is the first definitive time we can say we know she was really sick.

The Court: Doctor, I don't want you to answer this question except in a yes-or-no way: Did she tell you whether or not she had arrived at any verdicts in the case?

Mr. Evans: Your Honor, I am going to object, if I—

Dr. Alspach: No.

Mr. Evans: I want to object to that [12] question being asked or answered.

The Court: All right. I understand it is a very delicate question.

Mr. Kogen: what is your position in this context?

Mr. Kogen: My position is, I would like to have a yes-or-no answer because it's very important to some of the clients if they have reached a verdict.

Mr. Evans: Your Honor, in any event, I don't wish to keep interrupting. Before we go any further, it's obvious from what the doctor has said, whether the answer is yes or no, that this woman is incapable of serving on the jury.

The Court: Yes, I think so.

Mr. Evans: And I think that right is so basic in terms of the defendants that, even if the answer would be yes, that based upon the record that we have now, any attempt at a poll on any verdict, if there is one—and we are just speculating—would be impossible. Until there is some indication in open court what a verdict is, that verdict is not returned and the jury on legal grounds is still in a state of deliberations.

I would submit that is the posture we are in at this point.

[13] **The Court:** Well, you may well be right.

Mr. Rosen: Then there is no way, Your Honor, for the defendants to protect themselves as far as this record is concerned in light of the Lamb decision in the Ninth Circuit.

The Court: Which decision are you referring to?

Mr. Rosen: Where the jury actually had brought in a verdict of guilty and the judge refused to accept it based upon his judgment and it was contrary to his instructions. It was thereafter that he sent them out, received a

note from the juror that she could not deliberate because of her emotional problem, the death of a close friend, and she was replaced with an alternate.

The Court: With the agreement of the parties, as I recall it.

Mr. Rosen: No, sir. That's why it was reversed on that point.

Mr. Evans: But the law is, Your Honor, that until that verdict is returned in open court, there is no verdict.

The Court: This is true. I think that is an accurate statement.

Mr. Varon: That is not what Mr. Kogen [14] is talking about, though.

The Court: The question really that I think Mr. Kogen is interested in is the possibility of a verdict being rendered before this lady became ill to the extent that the doctor has described.

Now, the doctor says this would have started probably on Tuesday.

Dr. Alspach: Tuesday.

The Court: Tuesday evening.

When Tuesday, Doctor?

Dr. Alspach: I believe it was Tuesday evening.

Mr. Popper: Dr. Alspach, although you say the line may have been crossed on Tuesday last, there has to be a build-up, as you have explained it. Now, during the period of time of the build-up, is there any opinion, based on your expertise, that you can give us as to what her comprehension or ability of comprehension to receive this information was, as compared to the other parties?

Dr. Alspach: In answer to when this occurred, the first experience was Tuesday morning.

The Court: Tuesday morning?

Dr. Alspach: In answer to your question, I think that what we—it is almost impossible to say. [15] Sometimes an individual gradually moves into this psychotic episode, in which case you have a sort of vacillating ability and an increasing coloring of the material in terms of the inner process. At other times the break is somewhat more definitive and you can wake up in the morning, as it were, and you see everything differently.

Mr. Popper: We have seen it before.

Dr. Alspach: So—

Mr. Levin: Just by way of observation, Your Honor, if I recall correctly, the day they came back to be restructured, wasn't it Tuesday?

The Court: That's right, Tuesday morning.

Mr. Levin: And the exhibits did not actually get back to the jury until sometime during Tuesday morning and, in fact, Monday sometime. In fact, it was late on Monday that we were still dealing with the tape question and it was not until Tuesday sometime that they actually got the bulk of the tapes as well. It was not until Wednesday or Thursday—

The Court: Let me ask one or two more questions in deference to the doctor, because I know he wants to help us in every way possible but he also has his own problems.

[16] Doctor, did you discuss with her these cards?

Dr. Alspach: I did not.

The Court: Did you have a chance to look at them?

Dr. Alspach: I looked at them. Frankly, the writing was so poor that I had difficulty—

The Court: I had difficulty.

Dr. Alspach: I had difficulty understanding them.

The Court: I had difficulty, too.

I think we ought to take the time, just to be certain. If we may, Doctor, impose on your time just a little bit more, because this is a serious problem—

Dr. Alspach: I appreciate that.

The Court: From the standpoint of all parties.

Mr. Evans: Your Honor, may I inquire what the Court is about to do?

The Court: I am first going to look at the cards. Then, before I do anything, I will let you all know what I am planning on doing.

Mr. Evans: Fine.

The Court: Without telling us what is [17] on here, Doctor, I want you to look at a note and see if you can make it out first and, then, if that reinforces or takes away from it, adds to it or if you can read it—

Dr. Alspach: I would say that it is characteristic of what I have been describing.

The Court: Gentlemen, for your information, this note is 8-14, Tuesday. This is in the little group that I told you about that I put a paperclip on. I thought these would be more significant than the other group.

Mr. Kogen: Would Your Honor identify each of these groups by something on the cards to indicate the section in case it became a matter of record when needed to become a matter of record.

The Court: The one I showed the doctor was 8-14, Tuesday.

Are there any other questions of the doctor before we let him go?

Let me see if I can summarize, Doctor. You think any successful treatment of this lady might take as long as three weeks, maybe longer?

Dr. Alspach: I would say it would take a minimum of three weeks.

The Court: A minimum of three weeks?

[18] **Dr. Alspach:** Yes.

The Court: I assume that would be some sort of psychotherapy?

Dr. Alspach: Well, drug treatment.

The Court: That it would be harmful to her from a mental health standpoint to stay on this jury?

Dr. Alspach: I would say so, yes.

The Court: Now, I want to ask you in a non-leading way, is her judgment impaired at the present time or is it not impaired for the purposes of functioning as a juror and for answering questions which require the exercise of judgment? Is she or is she not impaired in that respect?

Dr. Alspach: She is impaired.

Mr. Evans: I have one further thing if the substantive aspects of this are —

The Court: Yes, sir.

Mr. Evans: — are completed, Your Honor, and that is I would wonder if the doctor could advise us—I think it is obvious that no matter what else happens with the other jurors, that this lady will have to be excused

post-haste. I was wondering how the doctor would recommend to us that that be handled.

The Court: That is a very good question and one that I thought of last night, as a matter of [19] fact.

I saw the marshals last night, incidentally, after talking to Dr. Alspach and told the marshals, in the best possible way, to segregate her. The marshal I talked to, Bob, indicated he thought he could handle it. I don't know how it has been done.

Mr. Kogen: You have not had an opportunity to talk to him?

The Court: She probably is with them now, I assume. I had asked the marshal to keep her, as much as possible, away from the other jurors.

The question Mr. Evans raises is a good one. Again, we have this lady's health to think about.

It's very unlikely, Doctor, that we can at this point keep this out of the newspapers. What is your opinion as how we should handle her, not only from that standpoint but from the standpoint of discharging her? How can we keep from exacerbating her condition?

I expect from what you have said that this is going to come as quite a shock to her.

Dr. Alspach: It's going to come as quite a shock and it's also going to be something she is ostensibly very reluctant about. She is very eager to take part in these deliberations.

[20] I think that the best way of handling it, in my opinion, would be for either her husband or you or I to talk to her in terms of mental fatigue, seeing things in an exaggerated way and needing to talk about her feelings.

Her husband, incidentally, wants her off the jury very quickly. He is quite upset by it.

The Court: Yes.

Dr. Alspach: He feels she is showing a tremendous movement in the direction of religion that she has never shown before and he is concerned with it. I think with his support and being very honest with her, that she does have a problem and we are operating in her best interests.

Unfortunately, many patients with emotional difficulties do not have a recognition that they have emotional difficulties. As such, this is another instance.

The Court: Do you think he should be present?

Dr. Alspach: I would say so, yes.

The Court: Gentlemen, what I would recommend is that she be segregated from the jury at this point. I don't quite know what we are going to do about it, but I think we should get the husband here as soon as possible.

[21] Is there some way we can get with you so the three of us can meet together?

We could come over to your office. How would you want to do it?

Dr. Alspach: I would make time available to be here. I presume this is where she is.

The Court: She is here, but we can handle it any way you want to. This is for her best interests. Should her husband monitor the newspapers for the next day or two, because there unquestionably is going to be reference to this—

Mr. Rosen: Your Honor, I don't see why there should be any reference other than the emotional strain—

The Court: We have a lot of considerations to take

care of. We have the possibility of a retrial of this case. I do not want anyone thinking that this jury, if it is retried, was aborted because of any misconduct on anybody's part, because of bribes or because the Government was guilty of misconduct or anything of that nature. I want the facts to come out in the newspaper and the only way to protect it—I have learned the hard way with the newspapers—is to tell them what the facts are.

Mr. Rosen: Can't it be the strain of [22] deliberations in sitting and emotional disturbance where she was no longer able to continue—period?

I don't see any reason to get into any psychiatric matters.

The Court: We can work out a statement.

What I am asking the doctor now is some way of protecting this lady from further injury.

Dr. Alspach: I think that, one, her removal from the jury is the first consideration. Secondly, it is to get her into treatment and then, thirdly, I think to treat it pretty much the same way as has been suggested. This would be as I talked to you previously, that it is very much like cop-out fatigue. It is surprising to me that this doesn't happen more often with people that are subjected to long trials and who are attempting in a very conscientious way to do a good job,—that they do not become depressed or manic, and so forth, more frequently.

Mr. Matthews: With reference to her being excused, Judge, is there any necessity that it be done in open court?

The Court: I wouldn't think so.

Mr. Matthews: If not, I would suggest that you let the marshal take her back to her hotel and have her husband

meet you and, if necessary, to have [23] there and excuse her from the doctor's office.

Mr. Rosen: I have a better suggestion, Your Honor. At this point I think we have some legal things to consider.

Why not, without segregating her in the eyes of the Press, take them back for a few hours to the doctor's office. Then the husband can meet there, as the doctor said, and it is not too obvious to the Press that she is being pulled out.

Mr. Evans: Well, now, I think she ought to be removed from this panel immediately.

The Court: If we are going to take any further steps. That is our next subject, as to what we are going to do about this. I think she should be removed.

Mr. Marshal, can you get her to her room, tell her that I have ordered that she remain in her room until her husband gets here and then arrange to have her husband come immediately and meet us at the hotel?

Doctor, could the court reporter and I and her husband meet you at 12:15 or whenever you say.

Dr. Alspach: How about two o'clock?

The Court: Fine.

Dr. Alspach: Would that be all right?

[24] **The Court:** Certainly. Two o'clock is fine. We will be in your office at two o'clock.

If any of you counsel would like to at least go over there—

Mr. Rosen: In light of what is going to be done, where the Court is simply going to excuse her—

The Court: I don't know. Maybe we don't need a court reporter. I could talk to the woman without—

Mr. Evans: We can make it easy. We would request that the court reporter be present. We don't desire to be there. We just desire that a record be made.

The Court: I think a record should be made of the conversation, particularly at this time, because we are dealing now with the release of a juror. She may make statements in my presence that I may want on the record.

Mr. Evans: Your Honor, I would request that not only she be removed now and taken to the hotel, but that the Court reconvene the jury in open court and advise them that Mrs. Loescher is being excused from the jury at this time; that there are matters which the Court must continue to take up with counsel, but for the time being they cannot and may not have any further [25] deliberations.

Then I would request that the Court make whatever further requests of the marshal service that might be in order to take up the jury's time while we deal with the remaining legal problems.

Mr. Rosen: I suggest that it be done by note rather than in open court, Your Honor. It could just be a simple note to the jury directing them not to deliberate and that Mrs. Loescher has been excused.

Mr. Kogen: Aren't we going to decide the legal problems before two o'clock, Judge?

The Court: I do think in some fashion or the other they should be told now that they are being reduced to eleven and they should in no way deliberate at all. Perhaps coming into court is the best way to do it. That is the most conservative, the safest way. We could do it in a number of ways. That is the safest way.

That is the way we will do it.

Gentlemen, let's go back to work.

Are there any other questions?

Doctor, thank you very much. We will see you at two o'clock.

Dr. Alspach: I will be there.

[26] *The Court:* Mr. Marshal, take her back to her room. Give her lunch. Keep her in the hotel until such time as we meet at the doctor's office at two o'clock.

In the meantime, we will get the jury in here. I will explain to them what has happened, and then we will proceed from there.

Mr. Kogen: Can you give me a few minutes before you have the rest of the jurors come in?

Mr. Matthews: Can we take a few minutes, Judge?

The Court: Yes. We will take the motions as soon as we are finished doing what we are doing.

(Recess taken)

The Court: Have a seat, gentlemen. The marshal will be bringing the jurors over.

(Jury re-called)

The Court: Good morning.

I want to thank you for your patience in waiting for us. As you know, we have been trying to deal with some difficult problems, as I know you have also.

The main reason for getting you in here is to tell you that we are going to have to send you [27] back to the hotel for the moment. I don't want to go into a lot of detail as to what we are doing and why we are doing it. As a matter of fact, I should not, except to say that please do not discuss among yourselves this particular problem any further.

When I say this particular problem, I am referring to the problem that pertains to the missing juror, Dorothy Loescher. I want you to know from a humanitarian standpoint that we have discussed assistance for her and that matter is proceeding in, I think, a proper way.

We have, however, some legal problems to take up at this time, and you may not then and cannot and should not deliberate when there are only eleven of you, assuming that Mrs. Loescher is indeed excused from the jury.

Now, that is something that the gentlemen and I are going to have to take up this morning, and maybe even this afternoon as well, and then if that comes about finally, we are going to have to determine what to do at that point.

Of course, we will keep you advised.

The purpose of bringing you in here was to tell you that we are going to send you back to the hotel while we are trying to take care of these problems [28] and that you should not in any way discuss this case until we finally have resolved these problems.

I am sure you all understand that. Are there any questions about what I have just said?

You may do whatever else the marshals permit you to do over there, but please do not discuss the case in any way.

Gentlemen, is there anyone who desires a side bar and any further instruction?

(Side bar conference)

Mr. Kogen: Judge, you told the jurors to not discuss the case. I think they should not only not discuss the case, but they should be admonished not to discuss the

problems with Mrs. Loescher, or whatever way you want to phrase it.

Mr. Levin: I thought Your Honor had done that.

The Court: I think I said that. I will be glad to repeat it.

Mr. Kogen: No, you don't have to repeat it.

(Side bar conference concluded)

The Court: Mr. Miller, would you take the jury back to the hotel?

(Jury excused)

(Court adjourned)

EXCERPTS FROM TRIAL TRANSCRIPT
August 21, 1975

VOLUME 105

[25] * * *

The Court: *** Gentlemen, based on her statements, the [26] testimony of Dr. Alspach, the discussion we have had here this morning, the positions of the parties, the failure of any counsel to object to her discharge because of what appears on the record, when it is my announced intention to do so, if there is no objection—and I might add, to be perfectly honest with you, in any event, whether or not there was, but there have been none—I think it would be a wrong thing to do, based on this record, for this Court to keep her on the jury.

It would be injurious to her health. It would be wrong for the other jurors, regardless of what disposition we made hereafter.

It is, therefore, the order of this Court, based on the manifest necessity of justice, and the health of this juror, that she be discharged from the jury and she will be discharged from the jury at two o'clock this afternoon.

Now, gentlemen, the question then remains as to whether or not a mistrial will be granted as has been moved for by Mr. Varon and Mr. Kogen, there being no positions at the moment from the other defendants.

I am going to ask the other defendants, then, Mr. Kogen and Mr. Varon—

[27] Mr. Rosen, do you wish to proceed with an eleven-person jury?

Mr. Rosen: I decline to do so, Your Honor.

The Court: Mr. Matthews, do you wish to proceed with an eleven-person jury?

Mr. Matthews: No, Judge. We would object to it.

The Court: Judge Popper, do you wish to proceed with an eleven-person jury?

Mr. Popper: No, sir.

The Court: Mr. Kogen, you have moved for a mistrial?

Mr. Kogen: I want to make a motion on that.

The Court: You have said —

Mr. Kogen: I would rather have an eleven-man jury than have a thirteenth juror.

The Court: I understand.

Mr. Tarkoff, what is your position, sir?

Mr. Tarkoff: I would object to the procedure.

The Court: Gentlemen, I must confess that I am persuaded by Mr. Varon and by Mr. Kogen, but I have not totally discounted the possibility of calling [28] in the alternate juror. We are doing research on it now.

I will be frank with you that the research suggests that it probably is not the thing to do. However, I want the Government to have time and I want you gentlemen to have time to research the point.

I am going to give you the afternoon and the evening to do it. We will meet here tomorrow morning at 9:30. At that time I am going to hear argument from you.

The case will either be mistried or we will proceed with the alternate juror.

Mr. Evans: Your Honor, it would be our present inclination to move at this time that Mrs. Evangelist be present in court at 9:30 in the morning to take a seat as the 12th juror, and it is our disposition, as of this time, to move that she be seated as the 12th juror.

What we would desire is that the wheels be put in motion so that that can be done if, in fact, it is the judgment of the Court, so that the matter of deliberations will not be prolonged any further.

The Court: I am going to want to hear argument.

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EXCERPTS FROM TRIAL TRANSCRIPT
August 22, 1979

VOLUME 106

[54]

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Mr. Varon: Just as a matter of information, Your Honor, may I ask where the jurors are at the present time?

The Court: They are in the jury room; Mrs. Evangelist is in this jury room.

Mr. Varon: Thank you.

The Court: So the record will be clear, they are in two separate jury rooms.

Mrs. Evangelist, would you take Seat No. 1.

Now, I am going to ask you, Mrs. Evangelist, to be sworn for this purpose.

(Alternate Juror Evangelist was duly sworn)

The Court: Mrs. Evangelist, I discharged you from your sequestration on Wednesday last, as I recall it.

Alternate Juror Evangelist: That's right.

The Court: I want to ask you several questions regarding your ability to be placed on the [55] jury as it is presently constituted.

Have you discussed this case with anyone, family or otherwise?

Alternate Juror Evangelist: No.

The Court: Have you become possessed of any information about this case through the media, through information provided by anyone else, through papers of any kind?

Alternate Juror Evangelist: No.

The Court: Do you feel that you are presently able, from the standpoint of giving all parties to this case a completely fair trial—do you feel that you are presently able to do that?

Alternate Juror Evangelist: Yes.

The Court: Has anything occurred between Wednesday, when you were discharged to go to your home under the restrictions placed upon you by the Court—has anything occurred since that time, which would in any way affect your judgment in sitting on this case?

Alternate Juror Evangelist: No.

The Court: All right. Gentlemen, are there any questions that you would like the Court to ask?

I will be glad to see you at side bar.

[56] *Mr. Popper:* Yes, sir.

(Side bar conference)

Mr. Popper: I would like you to ask her if she has been in contact with any media whatsoever. We have not had an answer to that.

The Court: I thought I asked that.

Mr. Popper: And whether she had a discussion about the case and she advised anybody whatsoever that she was sitting as a juror or was on standby.

The Court: I don't know that that is important.

Mr. Popper: I would like to know what her reply would be to those questions.

Mr. Levin: I think some of this is public knowledge.

The Court: Do you mean that she told her husband, for example?

Mr. Popper: No. There may be people in the neighborhood. Everybody in the world is not following this case. I would like to know about it, whether we believe they are or not.

The Court: All right. I will ask her that.

Mr. Popper: And I think we have that right, sir.

[57] *The Court:* I do want to ask her anything that is relevant and that affects the case.

Mr. Popper: Does she have any knowledge why she is being called back on this, because I would like to know if it would have any effect on her, if she knows why she is coming back.

The Court: That is what Mr. Matthews had requested.

Mr. Popper: She is going to hear that in the jury room, as to why she was called back.

Mr. Evans: Your Honor, for the record, it might be prudent also, just to establish that she has had no contact whatsoever with any of the other jurors.

Mr. Popper: And the rest of the panel.

The Court: Whether or not she has had any contact with any of the other jurors?

Mr. Evans: Yes, sir.

The Court: All right.

(Side bar conference concluded)

The Court: Mrs. Evangelist, have you had any conversations with anybody since you were discharged from sequestration on Wednesday, as to your status, that is, as to your standing by, and so forth?

Alternate Juror Evangelist: None.

The Court: Have you had any contact at [58] any time, since the jury was sent in to deliberate?

Alternate Juror Evangelist: No.

The Court: Have you had any contact with any members of that jury since that time?

Alternate Juror Evangelist: No.

The Court: Do you have any information as to why you are being recalled to possibly sit as a juror?

Alternate Juror Evangelist: The only information is what the Marshal's Office—they called me, I believe it was Monday afternoon, and said that someone was ill and that I should be on standby.

The Court: Did you all hear that, gentlemen?

Mr. Varon: Yes, sir.

The Court: Now, I think I have covered the questions that each of you had. Have I not covered each of those questions?

Mr. Popper: Yes, sir.

The Court: Would you take Mrs. Evangelist back to this jury room, please, and then bring in the other jury, please.

Mr. Matthews: Excuse me, Judge. Do you propose to do this collectively of the jurors or individually?

[59] *The Court:* Well, I had thought about doing it collectively. If there is some other suggestion, I will be glad to do it in any way you gentlemen desire.

Mr. Popper: Your Honor, I would recommend individually because in a collective group of people, they will be very shy on occasion to admit what could be possible human error or human frailty.

I think they are more prone to state clearly and concisely what has happened when they are alone.

The obvious rule of exclusion of witnesses in a trial will demonstrate that and this is where one cannot hear what another witness says. I think this should be treated in the same manner, so we can find out whether they are fair and impartial.

The Court: Mr. Evans.

Mr. Evans: Your Honor, at this particular stage it would be our recommendation that the inquiry be made of the total jury in the box, but individually, as the Court did with, as I may refer to it, the Mrs. Arrington situation.

We would then have no objection later on to a more in-depth inquiry, but we would feel that the proper inquiry at this stage of the proceeding [60] would be in the nature of the inquiry that the Court conducted previously regarding the other matter.

I would add to that that based upon the record, of course, we do have the situation with Mrs. Spires and the notes, which I think the Court may properly desire to take up individually with her and do that individually.

So far as going further in depth at this point in time, we would not recommend it. In fact, we would propose that that not be the procedure.

Mr. Matthews: Your Honor, maybe I am not clear as to what the inquiry is going to cover and consist of.

The Court: Well, there are several areas.

One is, first, the general area as to whether or not they feel that under the present circumstances they are all in a position where they can go forward and decide whatever issues remain in this case.

Mr. Matthews: In that event, I would object to a collective inquiry and would have the record note in the

remand of Allison the inquiry was made on an individual basis.

The Court: I want to do it in whatever way is the most acceptable and the safest. If that is doing it individually, we will do it that way.

[61] If necessary, we will do it in my office, with all of you gentlemen present.

Mr. Popper: Your Honor, inasmuch as we had a note from one juror and it contained certain complaints, that juror certainly, in the face of the other jurors, could not talk about that matter.

However, I think separately and apart, we could accomplish it.

The Court: We will do it separately. That is all right.

Now, gentlemen, do you wish it to be done in my office or in the courtroom?

Mr. Popper: I think we should do it in the court, Judge.

The Court: Mr. Evans.

Mr. Evans: Your Honor, we would feel that an inquiry in the court chambers would be more appropriate under these circumstances.

The Court: I think if indeed, Judge Popper, what you seek is a relaxed atmosphere and a jury that is uninfluenced by the surroundings, we should do it in my chambers. I think we should ask the questions there. In my opinion, that would be the most acceptable way to do it.

The doors will be kept open. It will [62] not be an *in camera* hearing.

Mr. Popper: That is acceptable. Thank you, Judge.

The Court: I think the jurors may be more expressive in that setting than they would be in a courtroom.

We will take them individually, then.

Mr. Evans: We have one request as to defense counsel, Your Honor.

May we have the record reflect the position or non-positions of all counsel with respect to the location?

The Court: Keeping in mind, gentlemen, that you are not waiving anything by stating a position on this procedure, is there anyone that has any firm position, one way or the other as to the way we should do it?

As has been expressed, I intend to do it in the office. If anyone feels that is wrong, I will be glad to hear from you on it.

All right. We will do it in the office, then, gentlemen. You can come back now, if you would.

(In Chambers)

The Court: Why don't we start off with Juror No. 2 and then we can take it from there.

[63] Gentlemen, let's just not get up and down. Let's just stay down. We will do that when they come in as a body. Otherwise, we will just be getting up and down.

Mr. Evans: Before Mr. Miller leaves, Your Honor, may I request —

Mr. Popper: He is gone.

Mr. Evans: Your Honor, I would request that the record reflect at this point what steps have been taken at this juncture and this morning with respect to this jury as to having individual jurors seal whatever working papers they had, including whatever they were working on, whether verdict forms or otherwise, in accordance

with the Court's instructions of yesterday.

The Court: Mr. Miller, would you tell us what has been done.

Marshal Miller: Yes, sir. They were given large brown envelopes today by me and they were asked to seal their individual work notes or papers, whatever they had made notes upon.

It was placed in those envelopes and it had their names on the outside.

The foreperson was instructed to take the verdict forms as such and put them in a separate [64] envelope, separate and apart, and we are holding this now.

The Court: Is it correct, then, that all those matters have been sealed by the jurors themselves without assistance from anyone from the Marshal's Service?

Marshal Miller: That's correct.

Mr. Evans: Very well, Your Honor. Then we would request that those papers there be tendered to the forelady of the jury, just collect everything.

The Court: Would you collect all of those, Mr. Miller, and we will put them all with the Court's exhibits. Let me have the package containing the verdict forms.

Marshal Miller: Yes, sir.

Mr. Evans: May the record reflect also where the exhibits are that have been in the jury room, whether they are in the boxes or just what sort of situation they are in, if we know.

The Court: Do you know where the exhibits are, Mr. Miller?

Marshal Miller: They are in numerous places in the courthouse.

The Court: Spread out?

Marshal Miller: Spread around in that [65] room that serves as a jury room.

Mr. Evans: Am I correct in assuming that situation has more or less been frozen as to the exhibits? Can we say that since deliberations were halted, when this problem first came to our attention, the jury was told not to deliberate further—

Marshal Miller: There were no deliberations and no more work went forward at all, Mr. Evans. Those exhibits are still there. As far as I know, it remains the same. They were to do nothing further.

Mr. Tarkoff: Are the eleven jurors in the same room where these exhibits are?

Marshal Miller: Yes, sir.

The Court: I am going to ask you, Mr. Miller, to put all those exhibits in a box, into several boxes. Emphasize to the jurors, as they are coming in and out, that they are not to deliberate in any way, nor are they to examine the exhibits until further notice.

Marshal Miller: Yes, sir.

The Court: Would you bring Juror No. 2—

Mr. Evans: Your Honor, I'm sorry.

Before any jurors come in, the Court indicated in the courtroom that the inquiry would be in [66] the nature of, "Do you feel you can go forward, do you feel you can determine issues that remain in the case,"—I think the latter was the phraseology.

We would request, of course, that the inquiry be, "Do you believe you can go back to square one and begin anew with respect to deliberations?"

Mr. Popper: Judge, I think we have to go further than that at this time.

The Court: Well—

Mr. Popper: Because matters have been brought up. I think these card situations were very important.

The Court: We will take care of everything with each one of them. What Mr. Evans said is required by the case that deals most exactly with these people.

People versus Collins, from California, explains how to go about this. They must, of course, go back to square one and start the entire deliberative process over again.

Mr. Tarkoff: Will they be asked if they have changed their opinion in the course of deliberations—if they are going to start anew, do they start with their original opinions or do they start with the opinions they have developed?

[67] **The Court:** It is a fair point.

Mr. Evans: Before any question along that line is framed, Your Honor, I would ask that that question be or whatever inquiry is to be put be carefully constructed as to its precise verbiage, because that would get into the area of the deliberations themselves.

The Court: You see, one of the problems incident to this entire process is the possibility—and I am stating this academically.

In a case of this type, one of the problems is the possibility that they have already reached conclusions.

Now, I must ask them whether or not they can wipe their minds of whatever they have done, whatever conclusions they have arrived at, and begin the entire deliberative process over again.

If they cannot, we will abort the procedure right now and start over again in a couple of months.

Mr. Kogen: If they cannot say this, I trust the Court will not prod them into changing their minds.

The Court: Absolutely not. Mr. Kogen, my desire to complete this case is not so consuming [68] that I want to do anything that will require a jury to reach a verdict just to reach a verdict.

If they can't go back and start over again, wipe their minds of what they have done, then we are going to have a mistrial. That's all there is to it.

Mr. Popper: In other words, Your Honor, we have many counts. Apparently, they have gone over it count by count.

The Court: I assume so.

Mr. Popper: If they have completed a discussion of the actual testimony on a particular count, you are going to ask them could they cleanse their mind and go back and forget that this ever occurred?

The Court: Isn't that what is required?

Mr. Evans: I think so, Your Honor. I would adhere to our position stated earlier, however, until that verdict is returned in open court, it is not a verdict.

The Court: That is another question.

Mr. Popper: That is different.

The Court: Right now what they are required to do, if this procedure has legal basis, is to start afresh.

Mr. Evans: That's correct, Your Honor. [69] The reason I stated that again was because I sort of gleaned from Mr. Propper's remarks —

The Court: That is what the paper called him.

Mr. Popper: Nobody signed a decree changing my name yet.

The Court: You were Irving Propper, were you not?

Mr. Popper: The only one who ruled on that so far was Joe.

The Court: I want to follow that Collins case. I think it is on the bench.

Mr. Evans: We, of course, would not agree with what Mr. Popper was requesting would be an inquiry as to whether or not verdicts have been reached on anything.

The Court: No, no. We are not going into that, no.

Mr. Popper: I didn't ask for that, Judge.

I asked if they had reached a conclusion within their mind and, had they reached a conclusion, could they then separate that and go back without any conclusion in their mind as to the evidence.

That is not a valid verdict, but that [70] means they have made up their mind and can they be free and independent now. It means it is a cleansing, and I would call it Clorox through the ears.

Mr. Matthews: I'm assuming that the entire inquiry will be conducted by the Court.

The Court: Yes, sir.

Gentlemen, if you have any questions, just pass them to me, please.

Mr. Varon: While you are waiting, Your Honor, may I raise an academic question?

In your opinion, to go forward with this case, you laid great stress and emphasis on the fact that not all counsel joined in the motion for a mistrial.

Now, when that has happened in other cases, when there have been multiple defendants and multiple counts, I have seen courts, and rightly so, grant the motions for a mistrial as to the particular defendants who asked for it and then go forward with the balance.

Now, I think Your Honor should give consideration to that. If that is the touchstone of your thinking that led you to give that opinion, why can't you grant my motion for a mistrial and grant Judge Popper's motion for a mistrial, and let the case go [71] forward?

The Court: I have given that some thought. I will take that under advisement.

Mr. Varon: That is the law and it is permissible and I am entitled to it.

The Court: You may be right. I am not sure. I will give that some more consideration.

Mr. Varon: Thank you, Your Honor.

Mr. Popper: Is it possible you may change your ruling on me?

The Court: I am going to give it further consideration.

Mr. Popper: Thank you, Judge.

The Court: Here is what I propose to go over, gentlemen:

To explain to them the process and that I must ask them if they are able to achieve it, and that is to go back to the beginning and start over again.

If they have arrived at conclusions—I am not going to ask them if they have arrived at verdicts.

I will ask them if they have arrived at conclusions in their own minds, can they wipe their minds clean, can they give what Mrs. Evangelist has to [72] say consider-

ation, can they start afresh, can they discuss the matter afresh, completely starting over again and dealing with all subjects as though they had never dealt with them before.

I am going to discuss with them the notes, which I believe to be Mrs. Loescher's, that were found in the bathroom.

I am going to discuss with Mr. Zemba the problem he related.

Incidentally, I am going to need those notes, the juror notes they sent in. I think my secretary has a file on them.

I think that will generally cover what we want to have.

Mr. Varon: Also, Mrs. Spires and her reading of those notes.

The Court: Yes, and if anyone has read them.

As a matter of fact, I will ask each one if they have seen those notes.

Mr. Rosen: I would ask the Court preliminarily to stress the necessity for complete openness and candid answers.

The Court: Yes, sir. I think that is probably indicated under these rather unusual [73] circumstances.

Are there any other suggestions?

Mr. Miller, let us get No. 2, Mr. Louis Rappel. I think it is Mr. Rappel.

Gentlemen, do you think it would be advisable and safe, rather than for emphasis, to put each one under oath?

Mr. Popper: Yes, sir.

Mr. Evans: I think that is advisable.

The Court: Mr. Rosen.

Mr. Rosen: I just wonder, also, Your Honor, whether it would be advisable to transport Mrs. Evangelist to the other jury room and bring the other jurors over here.

The Court: I think it might be easier. However, by the time we have done all that—

Mr. Rosen: It is just around the corner.

The Court: I suppose so.

These are the notes, gentlemen.

Mr. Rosen: I assume also the Court will tell each juror not to discuss with the other jurors what has taken place here?

The Court: Yes.

Mr. Rappel, sit over here, please, sir.

(Juror Rappel was duly sworn)

[74] *The Court:* Mr. Rappel, so that you will not be overwhelmed by this meeting that we are having, we are in the process of determining what to do about further proceedings in this case in view of Mrs. Loescher departing from the jury, with a view to our procedures, with a view to going forward with the case.

We want to ask each juror—and you are No. 2, so we are beginning with you—we want to ask each juror several questions to determine whether or not we can proceed.

You have been a very conscientious juror. I want you to tell us exactly what you think. Don't hold back anything.

Will you do that, please, sir?

Juror Rappel: Sure.

The Court: Now, first, one of the jurors apparently prepared a set of notes. I am not going to suggest to you who it was. Maybe you know who it was.

Have you seen these notes?

Juror Rappel: No.

The Court: Do you know anything about them?

Juror Rappel: No.

The Court: Let the record show that I have demonstrated to Mr. Rappel a set of three-by-five [75] notes.

Mr. Rappel, you have been sitting as a juror deliberating with Mrs. Loescher. Unfortunately, she became ill—I think you know that—and had to be replaced. At least, that was the position of the doctor who saw her.

Is there anything about your contact with her during roughly the week that you and she were in contact, not only as deliberating jurors, but on a social basis, at the hotel? Is there anything about your contact with her, what she said, what she did, that would prevent you from continuing as an effective juror on this case?

Juror Rappel: Oh, no.

The Court: In order for us to replace her with one of the alternates, the law requires that the jurors go back—be re instructed first, and then go back and start the deliberative process entirely over again.

Now, I am going to ask you, sir, if you feel that you can do that, start over again and wipe your mind of whatever you have done, listen to Mrs. Evangelist, listen to the others over again, treat these subjects freshly, treat them again, deliberate on them again and arrive at whatever conclusions again.

[76] Can you do that?

Juror Rappel: Well, I think it would create a little hardship.

The Court: In what respect?

Juror Rappel: As far as my personal health and my wife.

The Court: Could you be more specific?

Juror Rappel: Well, I could be, if I was given another day to talk it over. Personally, I don't feel well. I have got pains in my chest and, you know, my accident.

The Court: Yes.

Well, passing for the moment the question of your health, assuming you remain healthy, do you think you could do it?

Juror Rappel: Yes.

The Court: I am not going to ask you whether or not the jurors have arrived at any verdicts at all. That is not something we should know.

I am going to ask you this: In the event you have arrived at any conclusions, opinions, do you feel that you could wipe your mind of those conclusions and treat those particular subjects anew, giving consideration to whatever Mrs. Evangelist had to say?

Juror Rappel: Oh, yes.

[77] *The Court:* I have covered the subjects, gentleman, that I wanted to cover. Is there anything else that any of you would like to pass to me by way of a note that I should ask?

Now, Mr. Rappel, about your medical condition, do you need medical attention?

Juror Rappel: Well, I don't actually need it, but I should be examined.

The Court: Of course, we can arrange for that and will do so, if you wish us to.

Juror Rappel: Yes.

The Court: Now, I want you, please, not to discuss what we have talked about with any other jurors.

Juror Rappel: Sure.

The Court: Thank you very much. We appreciate your being in here.

Now, the juror who sits next to you is Mrs. Arrington, who is No. 3.

Mr. Levin: Yes, Your Honor.

The Court: Hattie, I think, is what her name is.

Thank you.

Would you bring Mrs. Arrington in, please.

[78] (Juror Rappel excused)

Mr. Rosen: Judge, I don't know if you mentioned anything about discussing—

The Court: Yes, I did.

Mr. Rosen: I was someplace else, then.

Mr. Matthews: Your Honor, I thought whoever mentioned it would ask if you brought up the subject of conclusions and, if they had any, that they would disregard them.

The Court: I do not want to know if he has reached conclusions. However, if he has, I want him to tell us.

I think Mr. Tarkoff's question was, could he dispossess himself of any opinions that he had made.

Mr. Tarkoff: I think I understood where the Court was going. Maybe to be even clearer, you should say that you are not talking about conclusions as to guilt or inno-

cence or whether he has reached an opinion as to any fact.

Mr. Popper: That would be individually, not as a group.

The Court: Yes, of course.

Mr. Popper: He, himself.

The Court: Yes, of course.

[79] *Mr. Popper:* I think it might be asked of them as a group.

The Court: Mr. Miller, would you go into the jury room, please. There are several boxes on the table over on the side. Would you remove them from the jury room and bring them in here.

Sit down, please, Mrs. Arrington.

Mr. Kogen: May I approach the Bench? There is something that has more importance to me than the boxes. I would like to touch on it with you.

The Court: Gentlemen, let us move over here to the side to discuss this.

(Side bar conference off the record)

(Thereupon, Juror Arrington was duly sworn)

The Court: Mrs. Arrington, I want to ask you several questions. However, before you answer any of these questions, I want to emphasize for you that you should not hesitate to tell us exactly what you think. Don't hold back anything. Tell us fully and frankly what your opinion is.

Would you do that?

Juror Arrington: Yes, sir.

The Court: We have had brought to our [80] atten-

tion the fact that some notes were in the jury room; have you ever seen these?

Juror Arrington: Yes, sir.

The Court: Tell us when you saw them.

Juror Arrington: Well, one of the other jurors first saw them and she showed them to me.

The Court: Did you read any of them?

Juror Arrington: Yes, a few of them.

The Court: Were you able to read them? Could you tell what was on here?

I note they are in handwriting. I don't know whether this handwriting is good enough to be clear.

Juror Arrington: Well, I read one or two.

The Court: Did those one or two affect you in any way, affect your thinking?

Juror Arrington: No.

The Court: Did it provide you with any information that you didn't already have?

Juror Arrington: No, sir.

The Court: Do you know who did these?

Juror Arrington: I didn't see her write them, so I really can't say.

The Court: Who do you think did them?

[81] **Juror Arrington:** I don't know the lady's name because we all called her Dorothy.

The Court: Is she the lady who isn't presently there?

Juror Arrington: Yes.

The Court: Now, that lady has been, as you know, removed from the jury.

I want to ask you, Mrs. Arrington, if anything she said to you or anything she did, any of her participation in this process, would prevent you from continuing as a juror in this case, would affect you to the extent that you don't think you could be impartial.

Juror Arrington: No, sir.

The Court: Now, we are presently in the process of seating another juror so that you can continue in your deliberations.

In order for us to be able to do that, we must know from you whether or not you feel that you are able to go back to the beginning, back where you were last Monday a week ago, start over completely, revisit all of these questions, deal with them one by one, giving Mrs. Evangelist all the consideration that is necessary in what she has to say, voicing your own feelings.

[82] Can you do that, starting over again where you were last Monday? Do you feel you can do that?

Juror Arrington: Yes, sir.

The Court: Now, it may well be—and we are not going to ask you to tell us, because it's none of our business.

I am saying to you that it may well be that you personally have arrived at some decisions or that you have formed some conclusions. I am going to ask you if you feel you will be able to wipe those from your mind, go back again, and consider them completely anew, taking into consideration again the opinions of all of the jurors, including Mrs. Evangelist.

Do you think you can do that?

Juror Arrington: Yes. Yes, sir.

The Court: I want to caution you not to discuss what we have discussed with any of the other jurors. All right?

Juror Arrington: Yes, sir.

The Court: You mentioned that another juror brought these to your attention. Would you please tell us who that was?

Juror Arrington: Mrs. Spires.

[83] *The Court:* Do you know if any other jurors saw these?

I know the foreperson, Mrs. Harachiewick, at least had them in her hand. Do you know of any other jurors who actually looked at them?

Juror Arrington: I really don't know, I don't think so.

The Court: Is there anything else, gentlemen?

Mrs. Arrington, when these notes came to your attention — and again I don't want you to tell us about your deliberations, about what you said about various parties in the case, but when these notes were brought to your attention, was there any conversation between you and Mrs. Spires or you and Mrs. Harachiewick or you and Mrs. Loescher, Dorothy?

Juror Arrington: No, sir.

Mr. Kogen: Your Honor, I have a question that I want to give you.

The Court: Yes, sir.

Mr. Kogen: It is not a question. It's a comment and I would like for you to frame the question based on the comment, if you see fit.

The Court: All right.

Do you remember, Mrs. Arrington, what [84] was in the card which you did read?

Juror Arrington: I remember what was said about me. She said that I was praying for her, or something to that effect.

The Court: Did what you read offend you?

Juror Arrington: No, sir.

The Court: Do you remember anything else that was in those cards?

Juror Arrington: I think there was something about Mr. Evans and Mr. Levin. I don't remember the words.

The Court: Did it have anything to do with the case itself or was it some personal observations about them?

Juror Arrington: No, sir.

The Court: Was it some personal observations that she was making about those gentlemen?

Juror Arrington: Yes.

The Court: Do you want me to press that any further?

Mr. Levin: No, thank you.

The Court: I think that is all. Thank you very much, Mrs. Arrington.

(Juror Arrington excused)

The Court: Bring in Mr. Kennedy, please.

[85] Let me check the room out myself. Maybe one of you gentlemen should come with me.

Mr. Varon: Your Honor, while we are waiting for Mr. Kennedy and while we have a reporter, I wonder if I can make my motion.

The Court: You certainly may.

Mr. Varon: We have just come from the jury room, where Mrs. Evangelist has been confined for a long period of time.

In that jury room there is one large chart, exposed to open view, which was the chart that was not admitted into evidence.

In addition, there were two unopened boxes of exhibits, which were not admitted into evidence, and there were also two or three closed boxes of evidentiary material.

In other words, two open and three were unopen.

Now, Your Honor, the fact that a juror has been exposed and in close proximity with open evidence is ground for mistrial.

The Court: And you so move?

Mr. Varon: Yes, sir.

The Court: All right, sir.

Mr. Kogen: I would like to go further [86] on that later.

The Court: Certainly.

Sit down, Mr. Kennedy.

Mr. Kennedy, don't be overawed by the number of people here.

We are trying to determine the fitness of our jury to go forward with further deliberations in view of Mrs. Loescher's discharge from the jury.

Juror Kennedy: Yes, sir.

The Court: So I want to ask you a couple of questions in that connection.

I am going to ask each of the jurors roughly the same questions, but I do not want any of you to discuss these with each other. Do you understand?

Juror Kennedy: Yes.

The Court: Or your answers.

Juror Kennedy: Yes.

The Court: First, were you aware or did you become aware of these notes that were in the jury room?

Juror Kennedy: No, sir. I just heard that she was writing them.

You know, she was sitting in front of me and I didn't read them. I don't know what's on those [87] cards. That's about it.

The Court: Did you talk to anybody about these notes?

Juror Kennedy: No, sir.

The Court: You say somebody was writing them. Do you know who was writing them?

Juror Kennedy: I believe Mrs. Loescher; I'm not sure. I couldn't swear to it.

The Court: In order for us to substitute an alternate at this time in the case, Mr. Kennedy, it is necessary that the jurors go back to the beginning.

Juror Kennedy: Yes, sir.

The Court: —Start their deliberations all over again, be reinstructed, go through the whole process again. You have got to really do that.

Juror Kennedy: Yes, sir.

The Court: I mean, you have got to say to yourself, "I'm putting everything out of my mind that we have done, I'm going to go back and I'm going to start over again, with all these other jurors, and the replacement juror. We're going to discuss this case just like we had walked in for the first time."

Juror Kennedy: Yes, sir.

The Court: Do you think you can do that?

[88] **Juror Kennedy:** I will do my best.

The Court: What do you think?

Juror Kennedy: I have been very nervous the last few days. I am willing to give it a try. I can do it.

The Court: All right, sir. If you believe you can do it, that is all we can ask.

I have one more question along that line to ask you.

Juror Kennedy: Yes, sir.

The Court: I am not asking you to tell us about anything you have done in there. As a matter of fact, I want you not to tell us what you have done.

What I am going to ask you is this question: In the event that you personally have arrived at any conclusions or formed any opinions or been party to any conclusions that have been arrived at, do you think you are able to completely put those out of your mind and start over again?

Juror Kennedy: Sure.

The Court: Is there anything else, gentlemen?

Thank you.

I assume that in your deliberations and also over the weekends, that you probably had some [89] contact with Dorothy Loescher.

Juror Kennedy: Yes.

The Court: Did anything she said or did affect you to the extent that it would impair your ability to deliberate in this case?

Juror Kennedy: I don't believe so.

You know, I just knew that something was wrong with

the lady and some—you know, most of the stuff she said didn't make any sense to me whatsoever.

I just blocked it out of my mind. You know, I just went along with her, you know, kind of agreed with her, you know, on whatever she said.

The Court: I gather from what you are saying that you don't feel it would impair your ability to serve as a juror?

Juror Kennedy: No, sir.

The Court: What she said and did in your presence?

Juror Kennedy: No, sir.

The Court: How did you determine, if you did, that she was taking notes?

Juror Kennedy: Well, I was sitting up there, you know, at the Judge's Bench there, and she was sitting down in front of me. She kept, you know, [90] telling us she has to make notes of this, make notes of that. I didn't pay any attention because I was listening to other people, you know.

The Court: Did you actually see her making notes?

Juror Kennedy: I can't swear to it.

The Court: But you did not see these particular notes?

Juror Kennedy: No, sir.

The Court: Is there anything else, gentlemen?

Did Mrs. Loescher ever tell you what was in these notes?

Juror Kennedy: I believe something about her revelations that she has been having, or something like that. That's about all.

The Court: Did that impress you or affect you, one way or the other?

Juror Kennedy: No, not really.

Mr. Kogen: No further questions.

The Court: Is there anything else, gentlemen?

All right. Thank you very much, Mr. Kennedy.

Please remember not to discuss this with [91] the other jurors.

Juror Kennedy: Thank you.

The Court: Thank you, sir.

(Juror Kennedy excused)

The Court: Call in the next juror, please, Mr. Miller.

Mr. Popper: Judge, I would like to join in Mr. Varon's motion.

I would like to further make a motion for mistrial on the basis that there was information not in evidence in the jury room, exposed and made available to all jurors who were then seated, eleven still being on the jury, and it was unauthorized matters and not in evidence. Therefore, I move for a mistrial.

Mr. Levin: Your Honor, would you place on the record your observations of the condition of the boxes that were unopen and the condition of the boxes that were open, as well as the fact, I believe, that the chart that was there, which I think was Government's Exhibit 10, which was a large map of the United States that was used extensively during opening argument and it was used during closing argument by both Government and defense counsel.

Mr. Varon: And the record should also [92] show whether it was exposed to open view.

The Court: Yes.

Gentlemen, let me say this—

Mr. Varon: Let the record reflect that I did not refer to the map or any of those things in my opening or closing.

As the Government people usually say in a case, they were in open view.

The Court: We will take care of that in a moment.

(Juror Rollins duly sworn)

The Court: Mrs. Rollins, don't be awed by the fact that we are all here with you.

We have a few questions or I have a few questions that I wanted to ask you relative to continuing on the jury—not your continuing on the jury, but the jury continuing as a whole.

As you know, Mrs. Loescher, because of her condition, has been excused.

Juror Rollins: Yes.

The Court: You were aware of that?

Juror Rollins: Yes.

The Court: Now, I have just a few questions, but I want you to understand, as I think you do understand, that you should tell us exactly what you [93] think.

Do not hold anything back. Don't be embarrassed to say whatever comes to your mind or whatever you think the truth requires.

Now, it has come to our attention, through the forewoman, that there were certain notes found in the jury room, these notes in particular.

Have you seen these?

Juror Rollins: I saw them before they were brought in. Some of them. Not all of them.

The Court: How many did you see?

Juror Rollins: The one I saw said something about Elnora.

The Court: That is Mrs. Spires?

Juror Rollins: Yes.

The Court: Did you see any others?

Juror Rollins: And about—let me see what she said. It was about Leroy, or something about that.

The Court: That's Mr. Pratt?

Juror Rollins: Yes.

The Court: Is there anything else you can remember?

Juror Rollins: No. That's the only two I saw.

[94] *The Court:* Do you know who made these notes?

Juror Rollins: Well, she has been writing, you know, but she has been confused. For how long, I don't know.

The Court: By confused, do you mean you did not think she was functioning properly?

Juror Rollins: She really—I think to me, I noticed it the Saturday before last, when she started talking extra, you know, a lot of about the differences of height and, you know, rattling on, that type of stuff.

The Court: Not sensible?

Juror Rollins: Not sensible.

The Court: When did this begin?

Juror Rollins: I noticed it last Saturday.

The Court: This just past, or a week ago Saturday?

Juror Rollins: A week ago. She started talking. When she came into the jury room, she was, you know—she

seemed to be a little better at times. It wasn't the same place at all times.

The Court: Did you discuss these notes with Mrs. Spires or Mr. Pratt?

[95] *Juror Rollins:* No.

The Court: Or anyone else, for that matter?

Juror Rollins: No.

The Court: Has Mrs. Loescher's condition or any statement she may have made to you, or in front of you, affected your ability to sit as a juror on this case?

Juror Rollins: No. But we have been here so long. I want to go home. I want to hurry and get this over with.

I told you my problem before, before this even started. I thought that by now we would be home. We have lost so much time.

The Court: I understand that, and it has been unfortunate.

Juror Rollins: Very.

The Court: It really isn't something anybody would have wanted or could control, really.

However, we are where we are and that raises the next question that I was going to ask you.

We are going to substitute an alternate juror. In order to do that, you must all begin at square one.

Juror Rollins: All over again?

[96] *The Court:* All over again.

Do you think you will be able to do that?

If she does not understand, I am sure she will tell me.

Juror Rollins: Do you mean all that voting and stuff—

The Court: I mean this, Mrs. Rollins, so that you understand exactly what I am saying:

Just like when I finished instructing you and you walked back there for the first time. You have got to start over again.

Juror Rollins: Oh, no. Do you mean go over and through everything?

The Court: Yes, ma'am.

Can you do that?

Juror Rollins: Tell me this—maybe I'm wrong. Do you mean from Saturday before last, when we went in the room to deliberate?

The Court: I mean, no matter what you have done as of right now, whatever conclusions or opinions you have arrived at, either individually or with others, the law requires that if we are to do this at all, you have to be able to wipe those out of your mind, go back and start over again, just like it was the beginning.

[97] **Juror Rollins:** Well, if I have to, I will do it, but I sure—

The Court: Do you think you can do it?

Juror Rollins: You know, I have took the oath. If I have to, I will. I really—I don't want to do that.

The Court: I understand.

Juror Rollins: That's the truth. I don't.

The Court: I understand. I appreciate your frankness. You will be reinstructed completely, just like we did it before.

Juror Rollins: Well, tell me this: Why do we have to work from nine to five. Why can't we stay here and do a lot and get through and go home?

The Court: You can, if you wish.

Juror Rollins: You know, there are 12 other people. Some people say they get tired.

The Court: I hope there are only eleven of them.

Juror Rollins: I mean, eleven. I forgot about her. You know what I mean. I forgot about her.

You know, I want to go home. I'm tired.

[98] *The Court:* I'm sure you all are. I want you to know that it is something we all understand.

We will have to reinstruct you and start over again.

Now, I understand what you have said, but I must ask you this question: As I said, I do understand what you said. I understand and appreciate your desire to get home and start a normal life.

Would that cause you to arrive at any conclusions in your further deliberations just for the sake of getting home?

Juror Rollins: No.

The Court: I did not think it would. But I do feel that I must ask you that.

Are there any other questions?

You are excused. Thank you, ma'am.

Please do not discuss what we have talked about with the other jurors. All right?

Juror Rollins: Okay.

The Court: Thank you, Mrs. Rollins.

(*Juror Rollins excused*)

Mr. Evans: Your Honor, I am going to register a quiet but nevertheless objection to Mr. Matthews violating our rule of inquiry in terms of this [99] past juror, and

that is counsel inquiring of the juror, as opposed to notes.

I would request that we strictly adhere to the guidelines.

The Court: I think Mr. Matthews did not mean to speak out.

Mr. Matthews: It was a quiet suggestion to you, Your Honor.

The Court: He felt that she didn't understand the question.

I am sure all counsel will pass me notes if they want questions asked.

Mr. Matthews: I really didn't ask a question, Judge. I just directed a quiet comment to you.

Mr. Tarkoff: Your Honor, while we have a break, I would also like to join in Mr. Varon's motion for mistrial as to Mr. Turner and Mr. Williams.

The Court: Keep in mind that she has not been seated yet. As of ten minutes from now, Mr. Clem will be on his way to Miami.

Mr. Tarkoff: There is one other observation that I would like to make.

On top of one of the closed boxes is a yellow sheet or a sheet from a yellow pad that [100] apparently contains some kind of inventory of what is contained in the closed boxes.

The Court: Yes. I think we'd better talk to—

Mr. Popper: Can we have a ruling on my motion on the cards?

Do you want to wait until they are all done?

The Court: Mr. Russell, have a seat, please, sir.

(Thereupon, Juror Russell was duly sworn)

The Court: Mr. Russell, we are asking the jurors a number of questions, several questions of each and every one of you, relative to our continuing the deliberations in this case.

As you know, Mrs. Loescher has been excused for I think I can properly describe as medical reasons.

We are going to put an alternate in, but we have to ask each of you certain questions to make sure that this process can continue. That is why we have you in here.

I want you to tell us exactly what you think. Just be as frank with us as you feel you must. [101] Tell us precisely what is on your mind. Do not hold anything back.

First, have you seen these cards?

Juror Russell: No, sir.

The Court: Did anybody tell you about cards prepared by Mrs. Loescher?

Juror Russell: Just what she said.

The Court: About these cards?

Juror Russell: She said something to the effect that she was making out cards because she can't remember that well. That's all I know about the cards.

The Court: Did she ever tell you what was in those cards?

Juror Russell: No, sir.

The Court: Did anything she either said or did, as far as you were concerned, or in your presence, to other people, affect you to the extent that you couldn't continue to deliberate on the jury?

Juror Russell: Not under those circumstances.

The Court: By those circumstances, what do you mean?

Juror Russell: Pertaining to what she has done, it wouldn't affect it.

The Court: When you say what she has done—

[102] **Juror Russell:** It's not pertaining to the case.

The Court: Not pertaining to the case?

Juror Russell: No.

The Court: Things that happened over the weekend or in the evenings?

Juror Russell: Well, it doesn't affect the case. It's something that I would like, you know, to not talk about because it doesn't—

The Court: Something that you would like—go ahead and tell us what you think.

Juror Russell: Well, it's kind of hard to say because, you know, I'm married and I have a three-year-old daughter and I would like to see my family.

I would like to have the right to have my family in my room with me, which I don't see no reason that I shouldn't.

From what I have been told is the reason for sequestration and the way things have been arranged, I don't see no reasons still.

The Court: Incidentally, did you get to see your family over the weekend?

Juror Russell: I have seen my wife. My daughter has been sick. She has had tonsillitis.

[103] **The Court:** Let me ask you this question, because you just raised it in my mind: While you were with your family—strike that question.

I assume the marshals told you what you should and should not be discussing?

Juror Russell: That's correct. We have been instructed since day one about what we should talk about.

The Court: Was there anything discussed when you saw your family over the weekend, about this case?

Juror Russell: Not about this case.

The Court: What is your daughter's condition at this time?

Juror Russell: She is getting better. She has had medication, and she's on medication now.

The Court: In order for us to continue this case, it is necessary when we replace a sick juror with an alternate that the jury start over again.

In other words, I will have to bring you back in and reinstruct you and send you back, just like it was the first day you did it.

Do you understand?

Juror Russell: Yes.

The Court: Are you able to do that?

[104] **Juror Russell:** As far as that is concerned, yes.

The Court: I am not going to ask you for any conclusions or opinions or decisions that you have made, if you have made any.

I will ask you this, though: Whatever opinions, either persons or as a group, you have participated in or made, can you wipe your mind of those and start afresh, listen to what the replacement juror has to say and deal with these matters again?

Juror Russell: Yes, sir.

The Court: Gentlemen, are there any other questions?

Please do not discuss what we have said here. All right, Mr. Russell?

Juror Russell: Okay.

The Court: Thank you, sir.

Juror Russell: When will I get a chance to talk with you about the other problem?

The Court: Which other problem?

Juror Russell: As far as my wife being allowed to come to my room.

The Court: All right. We can take that up perhaps at a time when there is a little less scrutiny of your personal situation.

[105] **Juror Russell:** Fine. Thank you.

The Court: Thank you, sir.

(Juror Russell excused)

The Court: Let us get the next juror. We are now in the second row, gentlemen.

Juror Pratt: Can I have a drink?

The Court: I am glad that you have retained your sense of humor, Mr. Pratt.

Have a seat.

(Thereupon, Juror Pratt was duly sworn)

The Court: Mr. Pratt, we have several questions that we want to ask of you. Please tell us exactly what you think. Just don't hold back on anything. It is relative to our continuing this case.

As you know, Mrs. Loescher has been excused for medical reasons.

Before we can continue with a replacement juror, we have to cover several subjects with each juror. Some are more particular than others.

I have here a group of handwritten three-by-five notes that Mrs. Harachiewick brought to us last week or—

Juror Popper: The beginning of this week, Judge.

[106] *The Court:* The beginning of this week.

Have you seen these?

Juror Pratt: Never.

The Court: Did you hear any talk about them?

Juror Pratt: No.

The Court: Now, Mr. Pratt, anything Mrs. Loescher said—or did she say anything, did she do anything in your presence or that you heard about that would prevent you from continuing on this jury as an effective juror? Would it impair your ability to continue?

Juror Pratt: No, sir.

The Court: In order for us to put in a replacement juror—I realize this might come as somewhat of a shock to you—I have got to reinstruct you and you have got to start your deliberations all over again. That is what we must do.

Will you be able to do that?

Juror Pratt: Yes, sir, as long as my employer doesn't say anything. As long as my employer doesn't say anything, I will be able to do it.

The Court: You are with Southern Bell, aren't you?

Juror Pratt: Yes, sir.

[107] *The Court:* Have they said anything yet?

Juror Pratt: Not yet. Not as of yet.

The Court: I am not going to ask you if you have reached any conclusions, if you have formed any opinion, either individually or as a group.

But I do want to ask you this: In the event you have, can you go back there and start anew, forget those, wipe them from your mind, starting the deliberation process over again, listen to the alternate juror, his or her views, as the case may be, and proceed to deal with each count over again? Can you do that?

Juror Pratt: Yes, sir, I can.

The Court: Is there anyone else who has any questions of Mr. Pratt?

You are excused, sir. Please don't discuss this with the other jurors. Thank you very much.

Juror Pratt: Send me a bottle of scotch.

The Court: You can take care of that in the evening.

Juror Pratt: Have a nice day.

The Court: Thank you, sir.

(Juror Pratt excused)

[108] (Thereupon, Juror Olafson was duly sworn)

The Court: Mrs. Olafson, with each juror we have been going over certain questions relative to continuing the jury process.

Please don't hesitate to tell us exactly what you think, regardless of whether or not it may be embarrassing for someone else or you or whatever. Just tell us exactly what you think, because it is important that we know your thoughts about this.

First, have you seen these three-by-five cards?

Juror Olafson: I have not read them.

The Court: Have you seen them physically like I am showing you?

Juror Olafson: At what period of time?

The Court: At any time.

Juror Olafson: I saw them in the ladies room.

The Court: The ladies room?

Juror Olafson: Yes.

The Court: Have you read any?

Juror Olafson: No.

The Court: Have you talked to anyone about them?

[109] *Juror Olafson:* Not essentially, other than that they were there.

The Court: Do you know if anyone else has read them?

Juror Olafson: Yes, I do.

The Court: Who?

Juror Olafson: Elnora, Mrs. Spires.

The Court: Mrs. Spires?

Juror Olafson: Yes.

The Court: Did you know that Mrs. Loescher has been excused because of her medical condition?

Juror Olafson: No, I didn't know that. Thanks.

The Court: Did you find anything unusual about Mrs. Loescher in the deliberative process or on the weekends?

Juror Olafson: I knew that there was something wrong.

The Court: She has been examined and excused. Now we are in the process of replacing her.

However, in order to do that, we have got to go over certain questions with you.

Did anything Mrs. Loescher said or did in your presence or about which you were advised affect [110] you to the point where it would be impossible for you to continue on this jury?

Juror Olafson: No.

The Court: In the event we continue, and we are certainly making every effort to—it would be necessary for me to reinstruct the jury, to send the jury back to begin deliberations all over again.

In other words, you would have to go back and you would have to start from square one with each count, go over them again and arrive at whatever conclusions you arrive at.

Can you do that?

Juror Olafson: Yes, sir.

The Court: I am not going to ask you whether you have arrived at any conclusions because it is none of our business, whether you either personally, or as a group, have formed conclusions, reached decisions.

I will ask you, if you have, can you go back and start all over again? Can you erase your mind of those, start the process again, listen to the alternate's contributions, such as they may be, and arrive at whatever conclusions you arrive at?

Juror Olafson: Yes, sir.

The Court: Completely fresh?

[111] *Juror Olafson:* Yes, sir.

The Court: Please do not discuss what we have talked about with the other jurors.

Are there any other questions you want to submit, gentlemen?

Thank you, Mrs. Olafson.

Juror Olafson: Thank you.

(*Juror Olafson excused*)

(Thereupon, *Juror Harachiewick* was duly sworn)

The Court: Mrs. Harachiewick, relative to continuing this process, we have a few more questions we would like to ask you. When I say a few more, I mean those that we covered with you the other day.

Juror Harachiewick: Yes, sir.

The Court: I know you have seen—and I should preface what I say by stating the obvious.

I want you to tell us everything you know, as I am sure you will. Don't hold back anything regardless of how you feel about it.

You did see these notes, did you not?

Juror Harachiewick: I brought them to you.

The Court: As a matter of fact, you brought them to us.

[112] *Juror Harachiewick:* That's correct.

The Court: I want you to repeat for these gentlemen, although I think most of them were here, how many of them you saw, if any.

Juror Harachiewick: That I read?

The Court: Read.

Juror Harachiewick: None.

The Court: It is my understanding now from information that I have just received, that there were other cards. Is that correct?

Juror Harachiewick: Other cards than those I brought you?

The Court: Than these.

Juror Harachiewick: I cannot answer that honestly.

The Court: Did you see any other cards?

Juror Harachiewick: Not to my knowledge.

The Court: Did anything Mrs. Loescher said or did in your presence or to you or about which you have been advised affect you to the extent that you would be unable to continue as a juror on this case?

Juror Harachiewick: I'm not usually easily persuaded.

The Court: Do I gather that is a no [113] answer?

Juror Harachiewick: That's a no answer.

The Court: In order for us to continue by replacing a juror, it is necessary that the jury start over again.

In fact, I will have to instruct the jury and then they will have to go back, they will have to elect a new foreman or forewoman, just as though this process had never happened.

Do you understand what I am saying?

Juror Harachiewick: Yes, sir.

The Court: Do you think that you would be able to do that?

Juror Harachiewick: To elect a new foreman or a new foreperson?

The Court: To go through this whole process over again, to start from square one, just start over again.

Can you do that?

Juror Harachiewick: Well, we are here to finish a job.

The Court: Would it offend you to the point that you could not properly serve if you were not elected fore-woman again?

Juror Harachiewick: No, sir.

[114] *The Court:* You would take no umbrage in that fact?

Juror Harachiewick: None at all.

The Court: You would not resent it?

Juror Harachiewick: None at all.

The Court: You might even be glad about it?

Juror Harachiewick: No comment.

The Court: I am not going to ask you whether you have arrived at any opinions or conclusions, or made any decisions, either personal, or as a group, because it is none of our business at this point.

I will ask you, though, that if you have done that, and some conclusions or opinions have been reached by you, can you erase those from your mind and can you start over again, right at the beginning, consider the advice, comments and opinions of your fellow jurors, including the new juror, the alternate, and deliberate again, just as you would have if you had never been out before?

Are you able to do that?

Juror Harachiewick: I don't see why not.

The Court: What you would have to do, and essentially what I am asking you is, if you can [115] just eliminate the process you have been through, from your mind, the comments of others, the opinions, good, bad or indifferent of the others.

I am asking you if you can just go back there and say to yourself, "I'm going to start over again and we are

going to deal with the subjects from the beginning."

Are you able to do that?

Juror Harachiewick: I believe so, yes.

The Court: Are there any other questions of Mrs. Harachiewick, gentlemen?

Yes, Mr. Rosen?

Were you aware of the fact, Mrs. Harachiewick, that Mrs. Arrington had seen some of these notes?

Juror Harachiewick: You have to forgive me. Could you use her first name?

The Court: Hattie.

Juror Harachiewick: Hattie, yes.

The Court: Did you discuss the notes with Mrs. Spires? I think her name is Elnora?

Juror Harachiewick: Eleanor is the one who came and got me. Eleanor is the one that found the notes.

The Court: Did you discuss the contents [116] of the notes with her at all?

Juror Harachiewick: I knew—she told me of one incident that was related in the notes, yes.

The Court: What did she tell you?

Juror Harachiewick: An incident that happened at the hotel restaurant Friday evening.

The Court: Was that with reference to a racial remark?

Juror Harachiewick: Yes, it was.

The Court: Was there anything else she told you?

Juror Harachiewick: She just said that it appeared that it was notes going through the entire weekend and possibly before with other notes, and I did not read them.

Mr. Kogen: Can I have the last answer read back?

The Court: They were notes going through the entire weekend, and possibly before that.

Is that essentially what you just said?

Juror Harachiewick: Yes.

Mr. Kogen: Thank you.

The Court: Is there anything else, gentlemen?

Thank you, Mrs. Harachiewick. Please [117] do not discuss what we have talked about with the other jurors. But we will be with you in a little bit.

Let us take about a five-minute break.

(Recess taken)

The Court: Mr. Miller, bring the next juror in, please.

(Thereupon, Juror Fuentes was duly sworn)

The Court: Mr. Fuentes, we are working on keeping the jury going.

Juror Fuentes: Yes, sir.

The Court: As you know, Mrs. Loescher was—maybe you don't know. She was released from the jury because of her medical condition.

We are now in the process of trying to put on an alternate juror. We have to cover certain things with each juror and that is what the process is that we are going through now.

I want to ask you, sir, have you had occasion to see this group of index cards that were in the jury room?

Juror Fuentes: No, sir.

The Court: Do you know anything about them?

Juror Fuentes: No, sir.

[118] **The Court:** Relative to Mrs. Loescher, did anything that she said or did, either during deliberations, or at the hotel, affect you in any way?

Juror Fuentes: No, sir.

The Court: Would anything she said or did affect your decisions or deliberations?

Juror Fuentes: No, sir.

The Court: In order for us to replace a juror and then continue the deliberations, it is necessary that I reinstruct the jury, and then they will go back in, elect a new foreperson, begin the deliberations all over again.

Do you think you will be able to do that?

Juror Fuentes: Sir, like I said before, I got new business here downtown. I take care of the maintenance. I know everything is behind there. My uncle is upset. He has the Spanish temper. I don't know what I'm going to do. I don't believe I can—

The Court: What?

Juror Fuentes: I don't believe I can stay such a long time, you know.

The Court: We don't know how long that will take. Do we?

Juror Fuentes: No, sir.

The Court: Can you begin the [119] deliberations over again?

Juror Fuentes: Yes, sir.

The Court: I am not going to ask you whether or not you have arrived at any conclusions or formed any opinions, either personally or with others. But if you begin the deliberation process over again, whatever opinions you have reached or conclusions you have

formed—can you erase those from your mind, begin over again, give consideration to the opinions of an alternate juror?

Juror Fuentes: I will, sir.

The Court: And just do the whole process over again?

Juror Fuentes: Yes, sir.

The Court: Now, the last question is, will you do that? Can you do that?

Juror Fuentes: I can do that, sir.

The Court: All right. In spite of your time problem?

Juror Fuentes: Yes. That's my problem.

The Court: Can you adjust your thinking to that problem?

Juror Fuentes: I believe so, sir.

The Court: All right, sir.

Now, I'm going to ask you another [120] question in view of your concern about your uncle, did you say?

Juror Fuentes: Yes, sir.

The Court: And your business?

You have indicated you can do it. I'm going to ask you this:

If you continue on the jury, as you have said you would, you could, can you give your undivided attention to the problems that face you, the problems of decision?

Juror Fuentes: Yes, sir. I have given my attention so far.

The Court: I am sure you have. I want to know if you can continue to do that.

Juror Fuentes: Yes, sir.

The Court: In spite of the fact that you know your uncle is waiting for you, your business is waiting for you, the papers are lying on your desk and piling up, can you give the case, in spite of those things, your undivided attention?

Juror Fuentes: Yes, sir.

The Court: Are there any other questions?

Thank you, Mr. Fuentes. Please don't discuss this with the other jurors.

Juror Fuentes: Yes, sir.

[121] **The Court:** Thank you.

(Juror Fuentes excused)

Mr. Matthews: May I make an inquiry of you, sir?

The Court: Yes, sir.

Mr. Matthews: I think you stated to Mrs. Harachie-wick that you now understand there were some other cards.

The Court: Oh, yes.

I have a note here, "Mr. Miller advises Mrs. Loescher had another stack of cards. She had them when she left. Showed them to the deputy."

Now, I think this is Janice, my secretary, talking.

"Asked if the other jurors saw them, and he said she showed them to the deputy. Apparently, she still has them."

Mr. Kogen: May I ask when you pose a question about their deliberations and conclusions, could we ask whether or not they can set aside the discussions that they heard, because they may not have come to a conclusion.

This is complete discussion and they have to clear their minds entirely about that.

The Court: Yes.

[122] (Thereupon, Juror Zemba was duly sworn)

The Court: Mr. Zemba, we are in the process of trying to replace a juror for Mrs. Loescher, who has been excused because of her medical condition.

In order to do that, I have got to ask each juror a series of questions. In your case, I want to ask you a few extra questions relative to your note to me the other day.

First, have you at any time seen these three-by-five index cards?

Juror Zemba: I had only seen the top one, I believe it was, Monday or Tuesday.

The Court: Did you read it?

Juror Zemba: No.

Well, let's put it this way: The top card was there. I kind of glanced at it. I saw my name; I saw Elnora's name.

The Court: You saw your name?

Juror Zemba: I saw Jim or James. I saw Elnora's name. That's about all, really, that I saw on it. I didn't pay any particular attention.

The Court: Did you discuss these notes at all with Mrs. Loescher?

Juror Zemba: No.

[123] *The Court:* Did you and she talk from time to time, either at the hotel, or in deliberations?

Juror Zemba: Talk about the case itself in deliberations?

The Court: Well, anything. At the hotel, for example.

Juror Zemba: No.

The Court: Did anything she said to you or did to you or said or did in your presence to others, affect you to the extent that it might affect your deliberations in some way or the other?

Juror Zemba: No. I mean, the conversations I have had with her, the ones I had, the short ones, were totally unrelated to the case itself, except in deliberations, of course.

The Court: Yes, of course.

You mentioned to us in a letter to me dated August 19, 1979, first, that you questioned your right to use this typewriter.

Juror Zemba: Correct.

The Court: I will answer that right now.

You have the right to use the typewriter.

Juror Zemba: Okay. Thank you.

The Court: You did not say it was in your off-time. I presume in your off-time you are doing [124] a paper for school?

Juror Zemba: Yes.

The Court: There is another thing you indicated here and that is that someone called you stupid for being on this jury.

Juror Zemba: Oh, yes.

The Court: Who was that?

Juror Zemba: There was a matron from the marshal's office one night, and it was more than that. It was a full conversation. That was in essence the conversation.

The Court: Let me ask you this: First, do you feel that way?

Juror Zemba: No. In fact, on the contrary. I told her that I felt just because I told the truth when I was being questioned on the stand, you know, during the picking of the jury—I said that I don't see someone being called stupid for telling the truth and having to do their duty on a jury.

The Court: I am sure everyone here agrees with you.

Juror Zemba: After talking with her a while, I got to the point where I just considered the source. However—

The Court: In any event, will that [125] affect your sitting on this jury?

Juror Zemba: No.

The Court: Now, you also mentioned that one of the marshals was showing special treatment to a certain group.

Do you mean women, as distinguished from men, or was it color, as distinguished—

Juror Zemba: I can go into incidents.

The Court: I would rather—

Juror Zemba: Based on a series of incidents that I had seen and was affected by it.

I felt that one marshal—well, I hate to use the word prejudice, but I considered it. I'll put it that way. Special treatment.

The Court: You are obviously referring, I would think—strike the word—I don't mean to strike the word, obviously.

Let me ask the question in another way:

Are you referring to color?

Juror Zemba: Yes. It had a direct effect on my wife, which the incident itself affected her, and based on,

through the overall situation, her condition, being pregnant, the whole thing, she let me know quite well of that incident, and coupled with a few other ones that I had noticed, they just kind of [126] compounded the situation, where I felt it should be brought up.

The Court: Were those events, which I trust will not recur—would those events in any way affect your continued deliberation on this jury?

Juror Zemba: No, I don't think so. In fact, I know, because what goes on here is here, and what goes on over there is totally unrelated, in my opinion.

The Court: Now, you mentioned that one marshal overstepped his authority to the point where you felt that he should not have.

I am not in a position to remember all that—

Juror Zemba: I think that was a poor word that I used. Yes. It did.

After thinking about it for quite a period, after even writing this letter, I felt it was probably a combination of personalities, that both of us probably were tired and maybe at times we got on each other's nerves. I'm not saying it was a one-sided thing.

The Court: Do you think that has straightened out now?

Juror Zemba: Oh, yes, I believe so. In [127] fact, I believe if I would meet him under other circumstances, we probably could get along pretty well.

The Court: Would that situation affect your ability to continue as a juror on this case?

Juror Zemba: No.

The Court: I think we have covered the last point about your use of the typewriter.

Juror Zemba: Yes.

The Court: Now, Mr. Zemba, in order to replace a juror in this process, it is necessary that I reinstruct the jury and then have you go back in and elect a new foreman, or forewoman, and begin the process completely over again.

Juror Zemba: Can I do that?

The Court: Can you do that?

Juror Zemba: Oh, yes.

The Court: Now, you may have arrived at some personal opinions. The jury may have arrived at some collective decisions. I am not asking you what they were. We have no right to know.

What I am going to ask you is this: Regardless of what those decisions or opinions were, personally, can you put those out of your mind, start over again, listen to the alternate, listen to your fellow jurors, revisit those questions, and do the job [128] over again, completely?

Juror Zemba: Yes.

The Court: Will you put out of your mind the discussions that you have had, the observations that you have made, that others have made to you, and start completely again?

Can you do that?

Juror Zemba: I can do that. As far as conversations of what we have done—

The Court: Don't tell us what you have done.

Juror Zemba: No, no. But being related to the evidence, I cannot forget the evidence that was given to us. As far as opinions that were brought up in there, yes.

The Court: We don't want you to forget the evidence. What I am suggesting to you, as an example, is that Mrs. Arrington may have said or anyone else may have said, "I think this about that evidence."

I want you to forget about that.

Juror Zemba: Oh, yes.

The Court: And start completely over again.

Can you do that?

Juror Zemba: Oh, yes. Yes.

[129] **The Court:** If you cannot, say so.

Juror Zemba: Without a doubt.

The Court: Are there any other questions?

Do you presently have any feeling of bitterness or hostility against any of your fellow jurors?

Juror Zemba: No. No.

The Court: The answer is no?

Juror Zemba: No.

The Court: "No, but" or just "no"?

Juror Zemba: No.

I think—as far as bitterness and stuff, no. In fact, we get along pretty well. There are just certain things that—

The Court: Are they relevant to your sitting on the jury?

Juror Zemba: No, but—well, it's a matter, I guess, of something that falls under personal needs.

It has nothing to do that is related to the case itself.

The Court: Is it anything that would affect your deliberations?

Juror Zemba: No.

[130] *The Court:* Or anyone else's deliberations, as far as you know?

Juror Zemba: No.

The Court: Are there any other questions, gentlemen?

All right, Mr. Zemba. Please don't discuss this with any of the other jurors.

Thank you, sir.

(*Juror Zemba excused*)

The Court: Call in the next one, please, Mr. Miller.

Mr. Rosen: Is Your Honor going to bring them in collectively, sooner or later, because I have observed almost uniformly, except for one or two, that since the camera and TV apparatus was focused in on them yesterday, all of a sudden they are dressed in their Sunday best, whereas in the previous days, we have seen them in the courtroom and they were in shirtsleeves and jeans and casual wear.

I just would like to know what effect the attention that has been focused on them might have on their deliberations.

The TV people were out in the north end of the courthouse, as I recall, yesterday, focusing in on their getting into the van and getting out of the [131] van and being brought in and brought out.

It just struck me that all of a sudden everybody was dressed to the T.

The Court: Maybe we should have had that attention during the trial, when they were all coming in with their shirtsleeves.

Mr. Evans: Your Honor, I had my suit cleaned for the first time in two months. I don't object to a general inquiry.

The Court: I am not sure that I see the point of it.
(Thereupon, Juror Spires was duly sworn)

The Court: Mrs. Spires, we are in the process of trying to seat another juror to replace Mrs. Loescher, who has been discharged for medical reasons.

I am not sure you are aware of that, one way or the other. This is the process we are going through.

We are asking each of the jurors questions that we must ask under these circumstances. I want to ask you a few questions.

Please tell us exactly what you think. Don't hold anything back. I am sure you will not.

Don't be overpowered by everybody being [132] present.

Have you had a chance to see these cards, Mrs. Spires?

These are a series of three-by-five index cards, with pen and pencil writing on them.

Juror Spires: Aren't they Mrs. Loescher's cards?

The Court: As far as I know, they are.

Juror Spires: Yes.

The Court: You have seen them?

Juror Spires: Yes.

The Court: Where did you first see them?

Juror Spires: In the bathroom.

The Court: Were you the first to see them?

Juror Spires: I believe so.

The Court: As I understand it, you brought that to Mrs. Harachiewick's attention?

Juror Spires: Yes.

The Court: Did you read any of them?

Juror Spires: The first card. That was the first card then. I don't know what is first now.

The Court: I can't tell you, either.

Do you remember what the first card said?

Juror Spires: There was—I am not [133] sure.

She used the word "freaky incident" in Room 803, with the lights going out, to that effect, and right away I knew it had to be something concerning her because, you know, I was there when that happened.

So I went to get Marjorie—

The Court: Marjorie Harachiewick?

Juror Spires: Yes. Because we had been—every little note she would write, we had been saving it, you know, to give to you come Monday morning.

So I told her, I believe, this is the stack of cards that she must have documented, you know, all the events on.

The Court: Had she been writing a lot of notes?

Juror Spires: I had never seen her writing anything. I was surprised it was there, you know, in writing. I had never seen her write once.

The Court: But that is the only one of the notes you saw, was the one you just described to us?

Juror Spires: The ones in that incident on it. I knew that involved her, so I knew it was her.

The Court: Did she ever say anything to you or in your presence that offended you?

Just tell us yes or no.

[134] *Juror Spires:* I'm ashamed to answer.

The Court: I assume the answer is yes.

Did she make up or apologize for whatever she said?

Juror Spires: Yes.

The Court: And whatever she said or did while she was deliberating with you as a juror or while you were in the hotel, would anything that she did say or do to you or in front of you or to others, affect your continuing to sit on this jury?

Juror Spires: What she said to me?

The Court: Yes, ma'am.

In other words, did she say anything to you that would make it impossible for you to think about—make you so angry, for example, that you couldn't give the case fair treatment?

Juror Spires: No, not from what she said.

The Court: Incidentally, you made a request over the weekend that you be able to chat with your minister and also visit with your family. Did you do that?

Juror Spires: Yes.

The Court: During those visits, were there any discussions of this case in any way?

[135] *Juror Spires:* No. I had one request, but you might know by now, that I asked the whole church to pray, you know, for one of the members of the jury and all of us collectively. That was my request.

The Court: Would I be invading your privacy if I asked which juror it was that you—

Juror Spires: I didn't call any name. I just said one of our jury members.

The Court: One of your—

Juror Spires: That are not feeling so well. I asked prayers for the jury member, and all of us.

The Court: Good.

That is the only thing that happened, as far as the case is concerned?

Juror Spires: Yes.

The Court: Mrs. Spirss, the process that we are going through requires that if we replace a juror, which we are planning on doing, so we can continue the process, the jury is going to have to be re instructed and then start the whole process over again.

Can you do that?

Juror Spires: Do I have a choice, Judge?

[136] *The Court:* Not really, except this:

You have a choice not as to whether or not you do it, but as to whether or not you are able to do it. You see, if you are able to do it, then I am going to insist respectfully that you do it.

If you are not able to do it physically or emotionally or mentally, that is what I am interested in.

Juror Spires: I have no physical or mental reasons why I can't, but I just want to be with my family again.

The Court: I understand.

Other than that, you feel that you are able to do it?

Juror Spires: Yes.

The Court: Now, I am sure you have heard discussions and have had discussions with others, obviously, during the week or more than you have been deliberating. I am not going to ask you about any conclusions or opinions, because we are not entitled to them.

If you have arrived at conclusions, personally or opinions personally, or as a group, do you feel that you can

put those out of your mind, go back in that jury room, and start the process over again?

[137] *Juror Spires*: As far as the defendants are concerned?

The Court: As far as the defendants, as far as all parties are concerned.

Juror Spires: Forgetting everything we have done?

The Court: Forgetting everything that you have done. Not the evidence.

Juror Spires: Oh, I see.

The Court: The evidence is there. I am talking about the discussions you have had, the opinions you have heard and everything you have observed.

Can you put them out of your mind, go back in there and start with the first count, or whatever count it is you started with, whatever you want to start with.

Can you go back in and start over again and go through the process again, listening to the opinions of the alternate juror who comes aboard, listening again to your fellow jurors, and offering your own opinions all over again? Can you do that?

Juror Spires: Yes.

The Court: Did you talk with Mrs. Hattie Arrington about the cards?

Juror Spires: I believe Hattie—I'm [138] not sure.

When I called Marjorie, it was during the time we were eating. Hattie might have been one of the ladies that were back there in the back eating.

When I called Marjorie, I think it was either Hattie or Joyce or Dorothy, and they all came, too, and Marjorie said to put them back and she was going to speak to you

about them.

I put them back in the bathroom.

The Court: Did you see any card with your name on it, or any other names on it?

Juror Spires: Yes. The card with the incident on there had my name.

The Court: Your first name is Elnora?

Juror Spires: Elnora. And if I'm not mistaken, it had Hattie's name and something about spirits.

The Court: Something about spirits?

Juror Spires: Spirits.

The Court: Did you and Dorothy Loescher ever discuss religion in your off-time?

Juror Spires: Yes.

The Court: Did you have any observation as to her condition, one way or the other?

Juror Spires: I think I was—I don't [139] know any other way to say it.

But, I think I was one of the last ones convinced that she was sick. You know, I thought she was tired, more than, you know—more than an emotional kind of a problem.

I'm a Sunday School teacher. She was going to go to Sunday School with me and we studied my Sunday School lesson together and talked about the service we had at our church, what type of service it was, you know, like that.

I have a eight-track tape of gospels, you know, that I listen to in the evening. You know, we talked about that.

The Court: Now, assuming that we get the jury back into full deliberations, would you, in spite of the fact

we are starting all over again, give all of the evidence, the cases of each defendant, the same care that I asked you to the last time we started?

Juror Spires: Yes.

The Court: You wouldn't rush it; you would do whatever is necessary?

Juror Spires: Yes.

The Court: All right. I don't have any other questions of Mrs. Spires.

Thank you, ma'am. Please do not discuss [140] what we have talked about with the other jurors.

Juror Spires: Okay.

(Juror Spires excused)

The Court: Gentlemen, Mrs. Spires is No. 12.

I think, then, we have completed our work with this jury.

Mr. Varon: Your Honor, can we later on discuss about what Mrs. Harachiewick saw in that jury room?

The Court: Right.

Gentlemen, I wanted you to know that if we found that Mrs. Evangelist has been tainted by this exposure in the other jury room, that Mr. Clem is on the way, and will be here tomorrow morning at 9:30.

Mr. Popper: Can you possibly make it 10:30 tomorrow morning?

We have been pushing away since because of this incident. We have kept on pushing, but we still are in practice.

The Court: He is going to be here and we don't really have to meet at exactly 9:30.

Mr. Varon: Your Honor is taking under advisement my motion for a mistrial under those special circumstances?

[141] **The Court:** About in there?

Mr. Varon: Yes, sir.

The Court: Oh, yes.

Mr. Popper: I take the same position he does, Your Honor.

The Court: I understand.

Come in.

Let the record indicate that Mrs. Evangelist was previously sworn.

Mr. Evangelist, please have a seat. We are still going through this process.

This morning, when you arrived, I guided you into that jury room; is that correct?

Alternate Juror Evangelist: Yes.

The Court: I did not look in as I put you in there, but I saw you down. Then you had some coffee.

Then, I think, we later provided you with some magazines, which I might add for the record, I leafed through before they were given to Mrs. Evangelist, just to make sure they didn't contain any materials that she should not review.

There are, however, several boxes of materials in there. I want to ask you, Mrs. Evangelist, in the time that you were in there, did you look in any [142] of those boxes?

Alternate Juror Evangelist: No.

The Court: There was a map with a group of names facing outward. Did you notice that?

Alternate Juror Evangelist: Yes, I noticed it.

The Court: Did you look at it?

Alternate Juror Evangelist: I looked at it, but, you know, I recognized it from the courtroom, having seen it in the courtroom.

The Court: Did you study it?

Alternate Juror Evangelist: No.

The Court: Did you look at the names on it?

Alternate Juror Evangelist: No.

The Court: Tell us in your own words how much observation you made of it?

Alternate Juror Evangelist: Very little, really.

Most of the time I slept while I was in there, until the magazines came in. Then I have been reading them since.

I made very little observation because I had seen it in the courtroom.

The Court: Specifically, did you get up [143] and look at it and look at the names and the places?

Alternate Juror Evangelist: No.

The Court: And so forth?

Alternate Juror Evangelist: No.

The Court: Could you tell us now where any of the names were related as far as position on the map is concerned?

Alternate Juror Evangelist: No.

The Court: Do you specifically remember, not from previously, but from what you saw today—do you remember any of the names at all?

Alternate Juror Evangelist: No, because I really didn't take much notice of it.

The Court: Gentlemen, do you have any questions you want me to ask Mrs. Evangelist?

Mr. Evans: We don't, Your Honor.

The Court: Mr. Miller, I would like you to keep Mrs. Evangelist segregated for the moment. I want to make arrangements for her with you, and we will do that when we have discharged everybody.

Would you go with Mr. Miller now, please. Thank you, ma'am.

Alternate Juror Evangelist: Thank you.

(Alternate Juror Evangelist excused)

EXCERPTS FROM TRIAL TRANSCRIPT
August 23, 1979

VOLUME 107

[19]

* * *

Mr. Rosen: As a matter of fact, I was going to ask Your Honor whether it would be permissible for me to call Mrs. Loescher and ask how she is.

The Court: I see no objection to it. There is no possibility of her resuming this panel.

Mrs. Evangelist, would you take seat No. 1, please, ma'am.

Mrs. Evangelist, we have just one or two more questions that we would like to ask you.

I remind you that you continue under the same oath that you have taken previously and yesterday.

Alternate Juror Evangelist: Yes.

The Court: It has to do with a little bit more development of the questions I asked you yesterday.

When you were in that room, you mentioned that you had noticed the map that had been used by counsel in closing argument.

Alternate Juror Evangelist: Yes.

The Court: Now, did you take any particular notice of that map?

Alternate Juror Evangelist: No.

The Court: Do you remember the names [20] that were on the map?

Alternate Juror Evangelist: No.

The Court: Did you recognize any of the names or did you, in fact, see the names yesterday so you could

ascertain them?

Alternate Juror Evangelist: No. All I remember is that physically the map was there and I recognized it. Other than that, I took no notice of it.

The Court: Now, with your view of that map, to the extent that you have described it to us, influence your verdict in this case in any way whatsoever?

Alternate Juror Evangelist: No.

The Court: Do you recall, Mrs. Evangelist, that at some point during or before the closing arguments I advised the jury that these maps were used solely for the purpose of aiding counsel in argument?

Alternate Juror Evangelist: I recall that.

The Court: That they could be used by both sides?

Alternate Juror Evangelist: Yes.

The Court: And that they were not in evidence in the case?

Alternate Juror Evangelist: I recall [21] that.

The Court: Can you follow that instruction?

Alternate Juror Evangelist: Certainly.

The Court: And whether having seen it in closing, as you know you did, or having viewed it to the extent that you did yesterday, can you put that out of your mind completely in your deliberations in this case?

If you can't, please tell us frankly that you can't.

Alternate Juror Evangelist: No, I can.

The Court: Now, regarding the boxes that were in there, did you see anything in any of those boxes?

Alternate Juror Evangelist: No.

The Court: Did you touch anything in those boxes?

Alternate Juror Evangelist: No.

The Court: Do you know what is in those boxes?

Alternate Juror Evangelist: No.

The Court: Is there anything that occurred in that room, while you were waiting, that would in any way prejudice you, either in favor of or [22] against any of the defendants or the Government?

Alternate Juror Evangelist: No.

The Court: Either way?

Alternate Juror Evangelist: No.

The Court: In the slightest?

Alternate Juror Evangelist: I'm positive it would have no effect on me at all.

In fact, all I know is physically there were boxes there. What they contained or what was—it would have no effect on me.

The Court: Gentlemen, are there any other questions you would like me to ask relative to this particular point before we proceed?

I will be glad to hear from you at side bar.

Mr. Evans: Not from us, Your Honor.

The Court: Gentlemen?

Judge Popper?

Is there anything further? You had one question you wanted to ask of me and I have covered that, I think, Mr. Evans. Some of the questions that were presented have been asked.

Mr. Popper: May I come to the side bar, sir?

The Court: Yes, sir.

[24] (Side bar conference)

(Side bar conference concluded)

The Court: One last question, Mrs. [25] Evangelist: Did you see anything on that map which would refresh your recollection as to the location of any parties or any incidents in this matter?

Alternate Juror Evangelist: No.

The Court: Mr. Marshal, would you take Mrs. Evangelist back to wherever you have been keeping her.

Now, I am going to call the regular jury in just a few minutes and I want Mrs. Evangelist to come with them.

* * *

[28] **Mr. Matthews:** Your Honor, do you want to bring all of the jurors back and then have Mrs. Evangelist be seated?

Is so, I have a motion, and I can make it now.

The Court: Why don't you make it now.

Let the record show that I am determining that she is qualified. I am going to seat her. I am going to discharge Mr. Clem—let me reverse myself on that.

I think I am going to hold on to Mr. Clem for a little while.

Mr. Rosen: Have we had a report for Mr. Rappel?

The Court: We have had none. He has not been examined yet.

Mr. Matthews: Assuming the juror has not been seated, my motion now would be for a mistrial based on the law I have previously argued.

The Court: Yes, sir.

I assume that that motion, Mr. Rosen, goes for you.

Mr. Rosen: My motion is to dismiss the indictment, assuming she is seated, on the basis of [29] double jeopardy.

The Court: Denied.

Mr. Tarkoff: I would join in that motion.

The Court: The motions for mistrial are taken under advisement.

Mr. Tarkoff: I would join in Mr. Rosen's motion on behalf of Mr. Turner and Mr. Williams in that this is now the second jury that is deciding the fate of Mr. Turner and Mr. Williams.

Mr. Varon: I think the record should show we all join.

The Court: All parties join in that motion. The motion to dismiss—

Mr. Rosen: And Mr. Matthews' motion, too.

The Court: You move similarly?

Mr. Matthews: I join in Mr. Rosen's motions.

Mr. Rosen: We all join in Mr. Matthews' motion.

The Court: I assume all of these motions are on behalf of all defendants.

The motions to dismiss are denied.

The motions for mistrial are taken under advisement.

[30] **Mr. Popper:** You had ruled on our motions to dismiss before.

The Court: There hasn't been a motion to dismiss before.

Mr. Popper: I said the motions for mistrial, the ones we made yesterday. I thought you made a ruling this morning.

The Court: I am taking the motions for mistrial presently made, in which you have all joined by definition—these motions I am taking under advisement. The motions to dismiss are denied.

Let us have the entire jury brought in.

Mr. Rosen: While they are getting the jury, Your Honor, are the twelve-column pads and papers and colored pencils and adding machine being removed from the jury room?

The Court: The adding machine has been left in there. As far as I know, the pads have been removed.

If you wish the adding machine removed, we will remove that, too.

Mr. Rosen: We are starting anew.

The Court: I think that is a fair observation.

I will instruct the marshal to remove [31] the adding machine as well.

If we are suggesting that we are starting anew, we are going to do so fully and completely.

Mr. Levin: I was going to advise Your Honor that I believe those copies of the indictment are now in chambers.

The Court: Fine.

Mr. Rosen: I trust, Your Honor, that the objections—

The Court: All copies of the indictment have been removed. They will be given new copies of the indictment.

Mr. Rosen: Because of the previous objections to the instructions, such as they were—

The Court: They remain the same. I will give them a new instruction on the new obligations they have.

Mr. Rosen: Well, I don't know if the Court plans to once again include the names of the originally-indicted co-defendants particularly.

The Court: I already have been over that once with them. If you wish, I will. If you wish not, I will not.

Mr. Rosen: I did not want those names included again.

* * *

[32] **The Court:** I will tell you what.

I think you had better get Mr. Clem out of this jury room. Tell the marshal to put him somewhere else.

This jury room has been purged, incidentally, of all offensive documents.

Put the present jury in that jury room.

Incidentally, is there anyone, although we haven't been doing this, who wishes Mrs. Evangelist sworn as a regular member of this jury?

I do not think it is necessary under the law. I think all that is necessary is that I replace Mrs. Loescher with Mrs. Evangelist.

So be it.

* * *

[36] (Jury recalled)

The Court: Good morning.

It is now my function to reinstruct you in accordance with what I think all of you are aware of has happened.

As you will recall, yesterday I asked you whether you would be able to start your deliberations anew and put out of your mind all the deliberations you have engaged in since August 11.

I want to remind you now that each of you stated you could do so, and I now instruct you that you must do

so. You must each put out of your minds all the deliberations that you have engaged in thus far. You must consider the evidence in this case anew just as you did when you first retired to deliberate this case.

You must each determine to start anew your consideration of each count and each defendant. You must not let anything that has happened in the course [37] of the period you have spent in deliberation in any way affect the course of your new deliberation.

You are to start fresh as if the past days have simply not happened. Each of you must keep in mind your pledge that you can begin your deliberations with a completely open mind. On each issue you must decide and you must abide by that pledge throughout your deliberations.

In order to help you start fresh in your thinking about this case, I am going to reinstruct you on the law, just as I instructed you on August 11.

I want each of you, as you listen to the instructions, to consider only the evidence you have heard at this trial and not in any way consider the deliberations you have engaged in during the past twelve days or any conclusions, tentative or final, that any of you may have reached in the course of your deliberations.

The reason for this requirement is that the law grants to the prosecution and to each defendant the right to a unanimous verdict, reached only after full participation of the twelve jurors who ultimately return verdicts.

That right can only be assured if the twelve of you who now make up this jury begin today as [38] if no prior deliberations had ever occurred.

The verdict of the jury cannot be unanimous unless each and every one of you reaches the decision through

deliberations which are the common experience of all of you. Each member of your group must have the benefit of the opinions and deliberations of the other eleven, and each of you must heed the personal reactions and interreactions of your fellow jurors, including your new member.

I emphasize this point because it is essential under the law that you deliberate together, among yourselves and without regard to what may have occurred earlier.

Although this requirement that you start deliberations anew may impose and undoubtedly does impose some hardship upon you in terms of the time spent re-reviewing the evidence of the trial, I am confident that each one of you will follow this necessary procedure.

I want to thank you for and commend you for your patience and your understanding. We have been in trial many months. The unfortunate events of this past week are the fault of no one, as I am sure you all understand. It is to solve that problem that we are proceeding the way we are presently proceeding.

[39] I was certainly, as I am sure all counsel were, impressed with your willingness to do that which you have agreed to do under these difficult circumstances, and, that is, to begin your deliberations anew.

You understand why. You understand the basic reason. You understand the job you have to do, and I commend you for your patience and your willingness and your interest in doing this difficult job which you have as jurors. I know you will follow the Court's instructions.

* * *

[95] Now, in arriving at a verdict, each of you must make up your own mind after consideration of all of the evidence as it is recalled by you. That consideration

should include the opinions of your fellow jurors as well as your own.

It is the essence of the jury system that you will listen to the views of one another and that you will do so with open minds and with a disposition to accept the views of the others if the reasons advanced are persuasive, based on common sense and the evidence and not contrary to the Court's instructions [96] on the record.

Any juror who, after such consideration of all of the evidence, comes to a firm conclusion different from the others, should not change that conclusion merely for the sake of conformity or unanimity.

You should, however, listen to and consider with all the views of your fellow jurors so that, if possible, you may arrive at a unanimous verdict.

In this court in order to render a verdict in any case, all of the jurors must concur. That means that each and every one of you must agree, must concur on the verdicts that you return in this case.

Upon retiring to the jury room you will select one of your number to act as a foreman or forewoman. I must point out to you that I mean just that. I am mindful of the fact that we have been through this process once before and one of your number was selected without our new lady being on the jury.

But this is a new jury in the sense only that you have had one new member. However, from the standpoint of all deliberations, to and including the selection of a foreman, you must visit that again. Go through that process again and do whatever you all collectively feel is the proper thing to do concerning the election of a foreman.

[105] Because of the procedure that we have undertaken here, because I know that you have been at work for some time, I want you to be especially mindful of the introductory instructions, of the comments and questions that you made and I asked yesterday about the pledge that you made to the Court, as to how you would go about this process. I know that you take very seriously your obligations as jurors.

That was evident yesterday.

[106] I want to ask you again, give the same care and deliberation that you would have if you were placed in this position if we had just put you back eleven or twelve days ago, however long it has been.

I want you to give exactly the same care as you would as if we had started back ten or eleven days ago. Put that out of your minds. Approach these problems freshly and totally, in line with these instructions. Consider the opinions of each other.

When I say of each other, I mean every one of you twelve. Consider these problems anew, the issues anew. Arrive at your conclusions as you feel they should be arrived at.

* * *

EXCERPT FROM TRIAL TRANSCRIPT
September 1, 1979

VOLUME 111

[157] * * *

Mr. Mahon: * * * Haven't they been out 21 days, the combined juries, how, Judge?

They went out Saturday.

The Court: They went out on a Saturday morning and began deliberating on it.

Mr. Tarkoff: On the 11th, I believe.

The Court: On the 11th and began deliberating on the 13th, I believe.

They went out on the 11th. They began deliberating on the 13th. Today is the 1st of September.

That is exactly, including weekends — well, it's three full weeks.

* * *

APPENDIX E

EXCERPTS FROM TRIAL TRANSCRIPT January 19, 1983

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

U.S. Courthouse
300 Northeast 1st Avenue
Miami, Florida

No. 82-326-Cr-CA

United States of America,
Plaintiff,

v.

Frederick Entman,
Defendant.

EXCERPT

The above-entitled trial resumed for Trial before The Honorable C. CLYDE ATKINS, United States District Judge, and a Jury, pursuant to adjournment.

[1] *The Court:* Ms. Ainsley and Ms. Meya, first I want to thank you for your service up to this point as members of the jury. We are very grateful to you because you were an essential element of the jury, an integral part of it. Under our rules, however, only 12 may retire to deliberate. That does not mean that you

are through in terms with this case. By that I mean this: In the event and probably the unlikely event, but I do say it is possible, in the event it becomes necessary to excuse any of the deliberating jurors, you will be called to replace that deliberating juror or jurors and the deliberations would start all over again anew and you will be a participant at that instance in the deliberations. And, ultimately and hopefully, you will participate in the verdict that is reached.

For that reason, I must preserve you. That means that you may, of course, go about your normal affairs. But I ask first that you not discuss the case amongst yourselves or with anyone or listen to its discussion in your presence or not watch any television program or listen to any radio broadcast or read any newspaper article which may relate to this case. I want to keep you in the same frame and state of mind that you are in now in terms of knowledge, as you would be if you came back to replace one of the sitting jurors. [2] It is a new procedure that is now available under a Fifth Circuit decision. And we think it is a very good one because it means almost two weeks are not wasted if something should happen, God forbid, to one of the jurors. That means that you cannot leave town without prior approval of the Court. I do not anticipate the jury is going to be out any great length of time. I have difficulty defining what I mean by great length of time, but I should think in the course of a reasonable time they will either agree or not agree as to a verdict.

So this is not a matter of an indefinite preservation of you, but you must not leave the area; that is, the county. Leave your phone number for your home, or your office number for your work, so that my courtroom deputy can get in touch with you if she needs to do so.

I hope it is clear to you what I am trying to do. I'm going to keep you preserved for use until the jury has reached a verdict or determine it cannot reach a verdict.

[3]

CERTIFICATE

I, GEORGE E. AHERN, Official Court Reporter, do hereby certify that the foregoing transcript, Pages 1 through 3, is a correct transcription of an excerpt of my stenographic notes of the trial in the above-entitled matter before The Honorable C. CLYDE ATKINS, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 3rd day of March, 1983.

GEORGE E. AHERN
